

No. 10946

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

ETHEL STRICKLAND ROGAN, as Executrix of the
ESTATE OF NAT ROGAN, Collector of Internal
Revenue for the Sixth District of California, Deceased,
Appellant,

vs.

CATHERINE B. FERRY, as Executrix of the Last
Will and Testament of PETER FERRY, Deceased,
Appellee.

TRANSCRIPT OF RECORD

(In Three Volumes)

VOLUME I

(Pages 1 to 456, Inclusive)

Upon Appeal from the District Court of the United States
for the Southern District of California,
Central Division

FILED

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PAUL P. O'BRIEN,
CLERK

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INDEX.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italics; and likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible an omission from the text is indicated by printing in italics the two words between which the omission seems to occur.]

	Page
Affidavit of E. H. Mitchell (for extension of time to file transcript).....	449
Amended Answer	12
Amendment to Complaint.....	19
Exhibit F. Statement of Protest, etc.....	22
Amendment to Complaint, Second.....	29
Answer, Amended	12
Answer to Amendment to Plaintiff's Complaint.....	28
Answer to Second Amendment to Plaintiff's Complaint	32
Appeal:	
Notice of	71
Order Extending Time to Docket Cause on.....	72
Order Regarding Record on.....	72
Attorneys, Names and Addresses of.....	1
Certificate of Probable Cause.....	44
Clerk's Certificate	74
Complaint, Amendment to.....	19
Exhibit F. Statement of Protest, etc.....	22
Complaint for Refund of Federal Estate Taxes Ille- gally Collected	2
Complaint, Second Amendment to.....	29
Conclusions of Law.....	62

	Page
Defendant's Objections to Form of Proposed Findings and Conclusions	36
Findings of Fact and Conclusions of Law.....	45
Judgment	68
Memorandum Opinion	34
Minute Order—January 31, 1944.....	35
Names and Addresses of Attorneys.....	1
Notice of Appeal.....	71
Objections to Form of Proposed Findings and Conclu- sions, Defendant's	36
Opinion, Memorandum	34
Order of District Court Extending Time to Docket Cause on Appeal.....	72
Order, Minute, January 31, 1944.....	35
Order Regarding Record on Appeal.....	72
Reporter's Transcript of Proceedings.....	76
Testimony on Behalf of Plaintiff:	
Eddy, Nathaniel N.—	
Direct examination	224
Ferry, Catherine B.—	
Direct examination	163
Direct examination (recalled).....	187
Direct examination (recalled).....	208
Cross-examination	209
Cross-examination (recalled)	302
Redirect examination	321

iii.

Reporter's Transcript of Proceedings:	Page
Testimony on Behalf of Plaintiff:	
Ferry, James L.—	
Direct examination	103
Direct examination (recalled).....	134
Cross-examination	141
Redirect examination	161
Recross-examination	162
Martell, Charles S.—	
Direct examination	92
Cross-examination	98
Testimony on Behalf of Defendant:	
Burkey, Noel A.—	
Direct examination	322
Cross-examination	332
Redirect examination	337
Ducker, Hugh L.—	
Direct examination	353
Cross-examination	362
Eddy, Nathaniel N.—	
Direct examination	235
Direct examination (recalled).....	261
Cross-examination	286
Redirect examination	298
Farries, Culbert W.—	
Direct examination	411
Cross-examination	417
Ferry, Catherine B.—	
Direct examination	388
Direct examination (recalled).....	420
Cross-examination	426

iv.

Reporter's Transcript of Proceedings:	Page
Testimony on Behalf of Defendant:	
Kinney, Wesley L.—	
Direct examination	402
Martell, Charles S.—	
Direct examination	368
Miller, Harry O.—	
Direct examination	376
Olson, Helen May—	
Direct examination	364
Cross-examination	365
Redirect examination	366
Parke, Walter E.—	
Direct examination	379
Robinson, John Moore—	
Direct examination	258
Statement of Points on Which Appellant Intends to Rely (Circuit Court).....	450
Stipulation and Order Regarding Record on Appeal.....	72
Stipulation (Circuit Court).....	448

INDEX TO EXHIBITS.

Plaintiff's Exhibits: No.	Page
1. Stipulation relative to facts (For Identification)	83
(In Evidence)	204
(In Book of Exhibits).....	457
2. Estate Tax Return (For Identification).....	83
(In Evidence)	154
(In Book of Exhibits).....	562
3. Letter, dated November 16, 1934, to Title Guarantee and Trust Company from Catherine B. Ferry and Peter L. Ferry (For Identification)	94
(In Evidence)	370
(In Book of Exhibits).....	623
4. Assignment of beneficial interest (In Book of Exhibits)	624
5. Agreement for the sale of road building equipment (For Identification).....	108
(In Evidence)	109
(In Book of Exhibits).....	625
6. Letter dated September 29, 1931, on the stationery of "Peter L. Ferry, General Contractor" (In Evidence).....	110
(In Book of Exhibits).....	627
7. Receipt of payment, dated October 1, 1931, signed by Peter L. Ferry (For Identification)	112
8. Check for \$346.79, dated April 15, 1935 (In Evidence)	118
(In Book of Exhibits).....	629

Plaintiff's Exhibits:	Page
No.	
9. Check for \$130.44, dated March 29, 1935 (In Evidence)	119
(In Book of Exhibits).....	629
10. Check for \$130.72, dated November 10, 1934 (In Evidence)	120
(In Book of Exhibits).....	629
11. Check for \$143.22, dated May 7, 1935 (In Evidence)	121
(In Book of Exhibits).....	629
12. Check for \$542.18, dated April 2, 1935 (In Evidence)	123
(In Book of Exhibits).....	629
13. Policy Number 2,145,686 of the Equitable Life Assurance Society on the life of Peter L. Ferry (In Evidence).....	123
(In Book of Exhibits).....	630
14. Policy Number 2,145,687 of the Equitable Life Assurance Society on the life of Peter L. Ferry (In Evidence)	123
(In Evidence)	124
(In Book of Exhibits)(.....	638
15. Policy Number 2,145,688 of the Equitable Life Assurance Society on the life of Peter L. Ferry (In Evidence)	124
(In Book of Exhibits).....	642
16. Policy Number 2,145,689 of the Equitable Life Assurance Society on the life of Peter L. Ferry (In Evidence)	125
(In Book of Exhibits).....	646

Plaintiff's Exhibits: No.	Page
17. Policy Number 2,145,690 of the Equitable Life Assurance Society on the life of Peter L. Ferry (In Evidence) (In Book of Exhibits).....	125 649
18. Policy Number 2,145,691 of the Equitable Life Assurance Society on the life of Peter L. Ferry (In Evidence) (In Book of Exhibits).....	126 651
19. Policy Number 2,481,456 of the Equitable Life Assurance Society on the life of Peter L. Ferry (In Evidence) (In Book of Exhibits).....	126 653
20. Policy Number 2,481,457 of the Equitable Life Assurance Society on the life of Peter L. Ferry (In Evidence) (In Book of Exhibits).....	126 655
21. Policy Number 186,434 of the Provident Life and Trust Company of Philadelphia on the life of Peter L. Ferry (In Evidence)..... (In Book of Exhibits).....	127 659
22. Policy Number 186,435 of the Provident Life and Trust Company of Philadelphia on the life of Peter L. Ferry (In Evidence)..... (In Book of Exhibits).....	127 661
23. Policy Number 319,963 of the Provident Life and Trust Company of Philadelphia on the life of Peter L. Ferry (In Evidence)..... (In Book of Exhibits).....	128 663

Plaintiff's Exhibits: No.	Page
24. Policy Number 319,964 of the Provident Life and Trust Company of Philadelphia on the life of Peter L. Ferry (In Evidence).....	128
(In Book of Exhibits).....	666
25. Policy Number 437,471 of the Provident Life and Trust Company of Philadelphia on the life of Peter L. Ferry (In Evidence).....	128
(In Book of Exhibits).....	669
26A & 26B. Policy Number 434,408 of the Phoenix Mutual Life Insurance Company on the life of Peter L. Ferry and Income Settlement Agreement (In Evidence).....	129
(In Book of Exhibits).....	671, 675
27. Policy Number 1,032,329 of Metropolitan Life Insurance Company on the life of Peter L. Ferry (In Evidence).....	130
(In Book of Exhibits).....	677
28. Policy Number 1,032,491 A of Metropolitan Life Insurance Company on the life of Peter L. Ferry (In Evidence).....	130
(In Book of Exhibits).....	680
29. Policy Number 67,233 of Merchants Life Insurance Company on the life of Peter L. Ferry (In Evidence)	130
(In Book of Exhibits).....	684
30. Life Insurance Statement—Form 712—Treasury Department (In Evidence).....	131
(In Book of Exhibits).....	687

Plaintiff's Exhibits: No.	Page
31. Letter of the Equitable Life Assurance Society, dated May 20, 1943 (In Evidence).....	132
(In Book of Exhibits).....	728
32. Letter of the Phoenix Mutual Life Insurance Company, dated May 17, 1943 (In Evidence)	132
(In Book of Exhibits).....	733
33. Letter of the Lincoln National Life Insurance Company, dated May 19, 1943 (In Evidence)	133
(In Book of Exhibits).....	734
34. Letter of the Prudential Insurance Company, dated May 24, 1943 (In Evidence).....	133
(In Book of Exhibits).....	735
35. Letter of Pacific Mutual Life Insurance Company, dated June 24, 1935 (In Evidence).....	133
(In Book of Exhibits).....	737
36. Five statements of the Provident Life and Trust Company of Philadelphia (In Evidence)	134
(In Book of Exhibits).....	738
37. Letter, dated May 25, 1943, from Knights of Columbus, together with "Charter Constitution Laws" of the Knights of Columbus for the year 1942 (In Evidence).....	134
38. Policy Number 6,908,821 of the Prudential Insurance Company of America on the life of Peter L. Ferry (In Evidence).....	178
(In Book of Exhibits).....	747

Plaintiff's Exhibits: No.	Page
39. Policy Number 6,908,822 of the Prudential Insurance Company of America on the life of Peter L. Ferry (In Evidence).....	178
(In Book of Exhibits).....	755
40. Policy Number 509,810 of the Pacific Mutual Life Insurance Company of California on the life of Peter L. Ferry (In Evidence).....	178
(In Book of Exhibits).....	762
41. Statement of Income distributed to Peter L. Ferry and Catherine B. Ferry from Trust No. 2012, Citizens National Trust and Savings Bank (In Evidence).....	180
(In Book of Exhibits).....	771
42. Statement of income distributed to Peter L. Ferry and Catherine B. Ferry in trust No. 1080, Title Guarantee and Trust Co. (In Evidence)	181
(In Book of Exhibits).....	772
43. Statement of income paid to Catherine B. Ferry from Trust No. S-5869, Security-First National Bank of Los Angeles (In Evidence)	181
(In Book of Exhibits).....	773
44. Distribution of income from Trust No. 4358, Security-First National Bank, to Peter L. Ferry and/or Catherine B. Ferry (In Evidence)	182
(In Book of Exhibits).....	776

Plaintiff's Exhibits: No.	Page
45. Original letter dated November 8, 1930, from the Treasury Department to Mr. Peter L. Ferry, together with enclosure attached thereto under same date, addressed to Peter L. Ferry (In Evidence)	183
(In Book of Exhibits).....	781
46. Individual tax return of Mrs. Peter L. Ferry (In Evidence)	185
(In Book of Exhibits).....	795
47. Individual tax return for the year 1928 for Peter L. Ferry and Haines Canyon Rock Company (In Evidence).....	187
(In Book of Exhibits).....	797
48 to 58. Group of Checks (For Identification).....	189
(In Evidence)	190
(In Book of Exhibits).....	799
59. Letter dated January 25, 1937 from the Treasury Department to Estate of Peter Ferry, Freston & Files, Attorneys for Executrix (For Identification).....	207
(In Evidence)	208
(In Book of Exhibits).....	823
61. Metropolitan Life Insurance Company Memorandum, on Policy No. 1032329A on the life of Peter L. Ferry (In Evidence).....	402
(In Book of Exhibits).....	828
62. Metropolitan Life Insurance Company memorandum on policy No. 1032491A, on the life of Peter L. Ferry (In Evidence).....	402
(In Book of Exhibits).....	830

Plaintiff's Exhibits:	Page
No.	

63. Distributions of income from Trust No. 1052, Title Guarantee and Trust Company (In Evi- dence)	423
(In Book of Exhibits).....	832
64. Summary of interest, accrued interest, and in- come, cash on hand in the various trusts, Peter L. Ferry Estate (In Evidence).....	441
(In Book of Exhibits).....	834
65. Defendant's pre-trial brief for Judge O'Con- nor (In Evidence).....	442
(In Book of Exhibits).....	835

Defendant's Exhibits:	Page
-----------------------	------

B. Certified copy of a letter dated February 20, 1940 addressed to Catherine B. Ferry, execu- trix, care of Claude I. Parker (In Evidence)	418
(In Book of Exhibits).....	843
C. Will of Peter L. Ferry dated May 10, 1930 (In Book of Exhibits).....	847
D. Estate tax major report (In Evidence).....	326
(In Book of Exhibits).....	849
E. Copies of Hugh L. Ducker's Report (In Evi- dence)	358
F. Portions of file in action for the Commissioner of Internal Revenue (For Identification).....	361
(In Evidence)	445
(In Book of Exhibits).....	909
G. Certificate of Deputy Commissioner D. S. Bliss, dated Sept. 15, 1942 (In Evidence).....	383
(In Book of Exhibits).....	1010

Defendant's Exhibits:	Page
H. Certified copy of individual income tax return of Peter L. Ferry for the year 1924 (In Evidence)	383
(In Book of Exhibits).....	1011
I. Certified copy of individual income tax return of Peter L. Ferry for the year 1926 (In Evidence)	384
(In Book of Exhibits).....	1013
J. Certified individual income tax return of Peter L. Ferry for the year 1927 (In Evidence)....	384
(In Book of Exhibits).....	1015
K. Certified individual income tax return of Peter L. Ferry for the year 1929 (In Evidence)....	384
(In Book of Exhibits).....	1017
L. Original individual income tax return of Mrs. Peter L. Ferry for the year 1929 (In Evidence)	385
(In Book of Exhibits).....	1019
M. Certified individual income tax return of Peter L. Ferry for the year 1930 (In Evidence)	385
(In Book of Exhibits).....	1021
N. Original income tax return of Mrs. Peter L. Ferry for the year 1930 (In Evidence).....	385
(In Book of Exhibits).....	1023
O. Individual income tax return of Peter L. Ferry for the year 1931 (In Evidence).....	386
(In Book of Exhibits).....	1025
P. Individual income tax return of Mrs. Peter L. Ferry for the year 1931 (In Evidence).....	386
(In Book of Exhibits).....	1027

Defendant's Exhibits:	Page
Q. Individual income tax return of Peter L. Ferry for the year 1932 (In Evidence).....	386
(In Book of Exhibits).....	1029
R. Individual income tax return of Mrs. Peter L. Ferry for the year 1932 (In Evidence)....	387
(In Book of Exhibits).....	1031
S. Individual income tax return of Peter L. Ferry for the year 1933 (In Evidence).....	387
(In Book of Exhibits).....	1033
T. Individual income tax return of Mrs. Peter L. Ferry for the year 1933 (In Evidence).....	387
(In Book of Exhibits).....	1035
U. Joint tenancy deed (In Evidence).....	407
(In Book of Exhibits).....	1037

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In the District Court of the United States in and for the
Southern District of California
Central Division

No. 2106-O'C Civil

CATHERINE B. FERRY, as Executrix of the Last Will
and Testament of PETER FERRY, Deceased,
Plaintiff,

vs.

NAT ROGAN, Collector of Internal Revenue for the
Sixth District of California,
Defendant.

COMPLAINT FOR REFUND OF FEDERAL
ESTATE TAXES ILLEGALLY COLLECTED

Plaintiff herein, for cause of action against the defendant, alleges:

I.

That on or about the sixteenth day of June, 1935, Peter Ferry died testate, a resident of the City of Glendale, County of Los Angeles, State of California, and the Sixth District of California. That soon thereafter letters testamentary were duly issued by the Superior Court of the State of California, in and for the County of Los Angeles, to Catherine B. Ferry, plaintiff herein; that immediately thereafter said Catherine B. Ferry did duly qualify and assume her duties as such executrix and continuously thereafter she has been and now is the duly appointed, qualified, and acting executrix of the estate of said decedent.

II.

That on or about the first day of July, 1935, the defendant, Nat Rogan, was duly appointed United States

Collector of Internal Revenue for the Sixth District of California, and continuously thereafter was and still is the duly appointed, qualified, and acting Collector of Internal Revenue for the said District, and during all of said times was and still is a resident and in- [2] habitant of the City of Los Angeles, State of California, and of the Sixth District of California.

III.

That plaintiff, a resident of said District, as such executrix, did duly file for the estate of said Peter Ferry, deceased, on or about the first day of June, 1936, with the defendant, as Collector of Internal Revenue for the Sixth District of California, a federal estate tax return, Form 706, in accordance with the provisions of law in that regard and the regulations of the Secretary of Treasury of the United States in pursuance thereof, showing therein a total net federal estate tax of sixteen thousand nine hundred five and seventeen-hundredths dollars (\$16,905.17); that at the time of filing said return, to wit, on the first day of June, 1936, plaintiff as such executrix as aforesaid, paid the defendant as Collector of Internal Revenue of the United States for the Sixth District of California, as and for federal estate tax on the estate of said Peter Ferry, deceased, the sum of sixteen thousand nine hundred five and seventeen hundredths dollars (\$16,905.17), being the sum shown as federal estate tax on said estate in said return filed as aforesaid.

That thereafter, and in pursuance of demands by said Commissioner of Internal Revenue, payments were made on account of said federal estate tax by plaintiff as such executrix on the dates and in the amounts as follows, to wit: On April 8, 1937, forty-eight thousand five hundred dollars (\$48,500.00); on April 30, 1937, fifteen thousand

dollars (\$15,000.00), and on June 12, 1937, eight thousand dollars (\$8,000.00), making total payments on account of said tax to that date of eighty-eight thousand four hundred five and seventeen-hundredths dollars (\$88,405.17).

IV.

That in due course the federal estate tax return, Form 706, was duly audited by the Office of the Commissioner of Internal [3] Revenue, resulting, on the fourth day of August, 1937, in a tentative proposed determination of deficiency tax amounting to sixty-one thousand one hundred eighty-three and nineteen-hundredths dollars (\$61,183.19). That plaintiff as executrix as aforesaid, was informed of such tentative proposed determination by a deficiency letter dated August 4, 1937, a copy of which is attached hereto and by specific reference made a part hereof and marked Exhibit A.

That said tentatively proposed deficiency federal estate tax in the amount of sixty-one thousand one hundred eighty-three and nineteen hundredths dollars (\$61,183.19) was in addition to the total amount of eighty-eight thousand four hundred five and seventeen-hundredths dollars (\$88,405.17) theretofore paid, as set forth in Paragraph III hereof. No credit was made in said tentatively proposed determination on account of the State of California inheritance tax in said matter, and it was stated therein that if "the full eighty per cent credit is allowed, the net deficiency tax will be \$32,353.80."

Said tentatively proposed net deficiency tax in the amount of thirty-two thousand three hundred fifty-three and eighty-hundredths dollars (\$32,353.80) was by plaintiff as such executrix paid to defendant as Collector of Internal Revenue of the United States in September, 1937,

together with interest thereon to date of payment, in the amount of two thousand one hundred sixty-one and fifty-hundredths dollars (\$2,161.50).

V.

That thereafter and as a result of a protest duly filed with the Commissioner of Internal Revenue, and following consideration thereof by his office, the Commissioner of Internal Revenue on January 22, 1938 proposed adjustments in the tentative determination of said federal estate tax payable in said matter, resulting in a proposed deficiency tax of twenty-six thousand five [4] hundred fourteen and thirty-five hundredths dollars (\$26,514.35) and resulting if "80 per cent credit is allowed against the gross tax computed under the Revenue Act of 1926" in "an overassessment and over payment of the tax in the sum of \$1,796.47". That plaintiff, as executrix as aforesaid, was informed of such proposed adjustments in the aforesaid tentative determination of tax liability and new tentative deficiency by a letter dated January 22, 1938, a copy of which is attached hereto and by specific reference made a part hereof and marked Exhibit B.

VI.

That on April 30, 1938, said Commissioner of Internal Revenue mailed to plaintiff as such executrix his certificate of overassessment of federal estate tax in said matter in the amount of fifteen hundred sixty-four and six-hundredths dollars (\$1,564.06). A copy of said certificate of overassessment is attached hereto and by specific reference made a part hereof and marked Exhibit C.

VII.

That thereafter, to wit, on or about the ninth day of February, 1939, plaintiff as such executrix as aforesaid,

duly and regularly filed with the said defendant as Collector of Internal Revenue of the United States for the Sixth District of California, for transmittal to the Commissioner of Internal Revenue of the United States, a claim for refund of federal estate tax erroneously and illegally assessed and collected in said matter in the sum of sixty-three thousand eight hundred twenty-five and seventy-seven hundredths dollars (\$63,825.77) "or such greater amount as is legally refundable", with interest thereon. A true copy of said claim for refund is attached hereto and by specific reference made a part hereof and marked Exhibit D.

That thereafter, said Commissioner of Internal Revenue, having audited said claim for refund, did find and determine that there had not been an overassessment or overpayment of federal [5] estate taxes against or by the Estate of Peter Ferry, the said decedent, or the plaintiff as such executrix and did therefore reject said claim for refund in its entirety by written rejection dated the eighteenth day of October, 1940. A true copy of said rejection in the form of a letter dated October 18, 1940, signed by D. S. Bliss, Deputy Commissioner of Internal Revenue, is attached hereto and by specific reference made a part hereof and marked Exhibit E.

VIII.

That the Commissioner of Internal Revenue of the United States erroneously and unlawfully exacted from plaintiff federal estate tax on the Estate of Peter Ferry, deceased, in the following particulars, to wit:

(a) That the Commissioner of Internal Revenue has erred in increasing the gross estate of the decedent by including therein certain trusts hereinafter referred to.

(b) That the Commissioner of Internal Revenue erred in increasing the valuations of items of insurance as hereinafter stated.

(c) That the Commissioner of Internal Revenue erred in refusing to allow only the amount of deductions shown in the federal estate tax return, Form 706, filed on behalf of said decedent and in allowing only the amount of deductions to the extent of the value of the probate estate.

IX.

Prior to the death of decedent, decedent and his wife made certain transfers of their property in trust. The said trusts are as follows:

Trust No. 5869, created February 10, 1925, in which the Security Trust and Savings Bank, a corporation, was named as Trustee, and in which the decedent and his wife were named as Trustors;

Trust No. 2012, created April 9, 1925, in which the [6] Citizens National Trust and Savings Bank was the Trustee, and the decedent and his wife were the Trustors;

Trust created October 9, 1925, in which the Pacific Southwest Trust and Savings Bank was the Trustee, and in which the decedent and his wife were the Trustors;

Trust No. 1052, created November 2, 1925, in which the Title Guarantee and Trust Company was named Trustee, and in which the decedent and his wife were named the Trustors;

Trust No. 6204, created June 5, 1930, in which the Citizens National Trust and Savings Bank of Los Angeles was named the Trustee, and in which the decedent and his wife were named the Trustors.

The Commissioner of Internal Revenue, in fixing the total estate tax liability due from the estate of said decedent, included the value of the entire corpus of each of said trusts. That decedent was the owner of only one-half interest in the corpus of said trusts and decedent's wife owned the remaining one-half of the corpus of each of said trusts. Only one-half the value of the corpus of each of said trusts was includable in the gross estate of decedent.

X.

The Commissioner of Internal Revenue increased the value of certain insurance policies, a part of the decedent's gross estate, from a total value of \$300,071.24 to a total value of \$332,632.72. That said increase in value was due to the elimination of the community property interest of decedent and his wife in and to the proceeds of said policies. That the premiums paid for the said insurance policies were paid out of the community income of decedent and his wife acquired from and after July 29, 1927 and from the separate property of decedent and from the separate property of decedent's wife. [7]

That for the years 1928 to and including the year 1935, separate returns of income were filed with the Commissioner of Internal Revenue by decedent and his wife, each showing thereon their respective income. That said income was deposited in a joint bank account and from said joint bank account was paid, among other things, the premiums on the said insurance policies.

That the amount of money in said bank account on August 1, 1937 was five thousand six hundred fifty and twenty-three hundredths dollars (\$5,650.23).

That for the year 1928 Mrs. Peter L. Ferry filed a separate income tax return showing thereon income of \$22,474.71. That Peter L. Ferry filed a separate income tax return for the year 1928 showing income thereon of \$31,088.38.

For the year 1929 Mrs. Peter L. Ferry filed separate income tax return, showing income of \$7,408.55, and Peter L. Ferry filed separate income tax return for said year showing income of \$11,755.11.

That for the year 1930 Mrs. Peter L. Ferry filed separate income tax return showing income of \$10,388.50, and Peter L. Ferry filed separate income tax return for said year, showing income of \$10,422.12.

For the year 1931 Mrs. Peter L. Ferry filed separate income tax return showing income of \$6,157.30, and Peter L. Ferry filed separate income tax return showing income of \$78.95.

For the year 1932 Mrs. Peter L. Ferry filed separate income tax return showing income of \$5,618.53, and for said year Peter L. Ferry filed separate income tax return showing loss of \$219.15.

For the year 1933 Mrs. Peter L. Ferry filed separate income tax return showing a loss of \$709.03, and Peter L. Ferry filed separate income tax return for said year showing income of \$2,026.40. [8]

For the year 1934 Peter L. Ferry and Mrs. Peter L. Ferry filed a joint return showing a loss of \$24,702.20.

For the year 1935 separate returns were filed by Mrs. Peter L. Ferry and Peter L. Ferry. That the return of Peter L. Ferry showed a loss of \$32,714.90. That the copy of the return of Mrs. Peter L. Ferry for the year 1935 has not been located, although diligent search has been made therefor, and the figures thereon can not at this time, therefore, be given.

XI.

That the total deductions claimed in decedent's federal estate tax return, Form 705, were fourteen thousand one hundred twenty-six and eighteen-hundredths dollars (\$14,126.18). That the total deductions allowed by the Commissioner of Internal Revenue were nine thousand nine hundred nine and sixty-hundredths dollars (\$9,909.60). That the balance of said deductions were disallowed by the Commissioner of Internal Revenue on the ground and for the sole reason that the value of decedent's probate estate was sufficient only to pay nine thousand nine hundred nine and sixty-hundredths dollars (\$9,909.60) of said deductions.

XII.

That by reason of the foregoing errors, plaintiff has overpaid federal estate tax due from the estate of said decedent in the sum of sixty-three thousand eight hundred twenty-five and seventy-seven hundredths dollars (\$63,825.77), plus interest paid thereon as required by law, together with interest on said payments of tax and interest from the dates thereof as hereinbefore alleged.

XIII.

Plaintiff is the Owner and holder of said claim for refund for federal estate taxes and no part of said sum of sixty-three thousand eight hundred twenty-five and seventy-seven hundredths dollars (\$63,825.77), plus the interest paid thereon, has been repaid or refunded. That the entire amount of tax and inter- [9]est paid by plaintiff as aforesaid, together with interest thereon at the rate of six per cent (6%) per annum from the date of payment as aforesaid, is due and unpaid from defendant to plaintiff.

Wherefore, Plaintiff prays for judgment in her favor against defendant in the sum of sixty-three thousand eight hundred twenty-five and seventy-seven hundredths dollars (\$63,825.77), plus interest paid thereon as required by law, together with interest on said total payment of tax and interest at the rate of six per cent (6%) per annum until the date of payment; for her costs herein expended; and for such other and further relief as the Court may deem meet and proper in the premises.

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RALPH W. SMITH

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Los Angeles, California.

[Verified.]

[Endorsed]: Filed Mar. 5, 1942. [10]

[Title of District Court and Cause.]

AMENDED ANSWER

Comes Now, the defendant in the above-entitled action, and in answer to plaintiff's complaint, admits, denies and alleges:

I.

Admits the allegations contained in Paragraph I thereof.

II.

Admits the allegations contained in Paragraph II thereof.

III.

Admits the allegations contained in Paragraph III thereof.

IV.

In answer to Paragraph IV thereof, defendant alleges that in addition to the \$88,405.17 paid by plaintiff to defendant on and [26] prior to June 12, 1937, plaintiff paid to defendant as such Collector, on account of deficiency assessments of estate taxes, principal and accrued interest, the following sums on the following dates, to wit:

July 27, 1937.....	\$ 3,625.89
July 27, 1937.....	30,049.11
November 29, 1938.....	2,902.13
November 29, 1938.....	204.72

Total additional payments....\$36,781.85

Defendant denies the allegations of Paragraph IV of plaintiff's complaint, insofar as they are inconsistent with the foregoing allegations.

V.

In answer to Paragraph V thereof, defendant states that he is without knowledge or information sufficient to form a belief as to the truth of the allegations contained therein.

VI.

Admits the allegations contained in Paragraph VI thereof.

VII.

Admits the allegations contained in Paragraph VII thereof, except that defendant denies that any Federal estate tax was erroneously or illegally assessed or collected from plaintiff.

VIII.

Denies the allegations contained in Paragraph VIII thereof.

Defendant alleges that the Court is without jurisdiction of the subject matter of this action insofar as concerns the ground of recovery alleged in sub-paragraph (c) of said Paragraph VIII; and that the Commissioner's disallowance of a portion of plaintiff's claimed deductions was not raised as an error and ground for recovery in her claim for refund.

IX.

In answer to Paragraph IX thereof, defendant denies that decedent and his wife made any of the transfers therein described; and denies [27] that any of said transfers constituted transfers of property of decedent and his

wife. In that connection, defendant alleges that all of such transfers were made by decedent alone and were transfers of property of decedent only. Defendant denies that decedent was the owner of only a one-half interest in the corpus of said trusts; denies that decedent's wife owned the other one-half of the corpus of each of said trusts; and denies that only one-half the value of the corpus of each of said trusts was includable in decedent's gross estate for Federal estate tax purposes.

Further answering said Paragraph IX, defendant admits that in fixing the total estate tax liability of decedent's estate, the Commissioner included the value of the entire corpus of each of the five trusts referred to in said Paragraph, and alleges that the Commissioner also included therein the value of a transfer by decedent to his children, without consideration, of a one-twentieth interest in Trust No. 1,080 of the Title Insurance and Trust Company, Trustee; that the value of said interest so included was \$2,500; that said gift was made on the 28th day of May, 1935, nineteen days before the donor's death and while he was seriously incapacitated with cancer; and that said gift was made in contemplation of death.

Further answering said Paragraph IX, defendant alleges that each of the transfers described therein was made by the decedent to the extent of 100% thereof and were then intended by him to take effect in possession and enjoyment at or after his death; that in and by each such transfer decedent retained for the remainder of his life the possession and enjoyment of the income from the property so transferred, together with the right to designate the persons who should enjoy the property and the income therefrom; and that the enjoyment of such transferred property, including both corpus and in-

come, was at the date of his death subject to changes through the exercise by him of retained powers to alter, amend and revoke the said transfers and the terms of said trusts. [28]

X.

In answer to the first paragraph of Paragraph X thereof, defendant admits that the Commissioner increased the value of certain insurance policies, for estate tax purposes, from a total value of \$300,071.24 to a total value of \$332,632.72. Defendant states that he is without knowledge or information sufficient to form a belief as to the truth of the averments to the effect that decedent's wife had a community property interest or any other type of interest in the proceeds of said life insurance policies, and to the effect that the premiums paid for such policies were paid out of community income of the decedent and his wife earned or acquired after July 29, 1927, and/or were paid in whole or in part from or out of the separate property of decedent's wife.

Further answering the first paragraph of Paragraph X of plaintiff's complaint, defendant is informed and believes and therefore alleges that all of said policies were taken out by decedent upon his own life, and that in and by said contracts of life insurance decedent intended to and did retain for the remainder of his lifetime the legal right and power, acting alone and without his wife's knowledge or consent,

- 1st. To sell, assign and pledge said policies and surrender them for cash, all for his own personal and exclusive benefit.
- 2d. To collect and appropriate to his own personal and exclusive use and benefit the interest and dividends accruing thereunder, and
- 3d. To change the beneficiaries thereunder.

Defendant is further informed and believes and therefore alleges that in and by said contracts of insurance decedent transferred nothing to the beneficiaries therein named that could take effect in possession or enjoyment until after his death, and that insofar as the proceeds of any [29] of said policies were made payable to his estate or executor, or were received by either upon his death, such proceeds to the extent of 100% thereof were subject to the payment of decedent's personal and separate debts and his personal and separate obligations contracted for his sole benefit or which arose by operation of law during his lifetime, as well as to expenses of administration.

In answer to the remainder of said Paragraph X, defendant states that he is without knowledge or information sufficient to form a belief as to the truth of the averments to the effect:

- 1st. That income reported by the spouses for income tax purposes was deposited in a joint bank account.
- 2d. That said insurance premiums were paid from said bank account.
- 3d. That \$5,650.23, or any other sum of money, was on deposit in said account on August 1, 1927, or on any other day, and
- 4th. That separate income tax returns were filed by the spouses for the years 1928 through 1935, and that the amounts therein reported were the amounts alleged in said paragraph.

Insofar as concerns the allegations contained in said Paragraph X of plaintiff's complaint relating to the filing of income tax returns and to the amounts of income re-

ported therein, defendant alleges that proof of the truth of such averments will not be admissible at the trial of this case if offered by plaintiff, since they would be self-serving declarations made by her and decedent. Defendant will object to any such offer by plaintiff.

XI.

Defendant admits the allegations contained in Paragraph XI thereof. In that connection, however, defendant alleges that the Court is without jurisdiction of the subject matter of this action, insofar as [30] concerns the ground of recovery alleged in Paragraph XI of plaintiff's complaint; and that the Commissioner's disallowance of a portion of plaintiff's claimed deductions was not raised as an error and ground for recovery in her claim for refund.

XII.

Defendant denies the allegations contained in Paragraph XII thereof.

XIII.

In answer to Paragraphs XIII thereof, defendant states that he is without knowledge or information sufficient to form a belief as to the truth of the allegation to the effect that the plaintiff is the owner and holder of said claim for refund of Federal estate taxes. Defendant admits that no part of the sum claimed by plaintiff has been repaid or refunded. Defendant specifically denies that any portion of the estate tax and interest paid, or interest thereon, is due from defendant to plaintiff.

Wherefore, having fully answered, defendant prays that he be hence dismissed with his costs in this behalf expended.

WM. FLEET PALMER
United States Attorney

E. H. MITCHELL

Assistant United States Attorney

EUGENE HARPOLE

Special Attorney,

Bureau of Internal Revenue

By E. H. Mitchell

Attorneys for Defendant

It Is Hereby Stipulated and Agreed by and between the parties to the above-entitled action, through their respective counsel undersigned, that an order may be entered herein permitting the [31] filing of the foregoing amended answer to plaintiff's complaint.

CLAUDE I. PARKER

RALPH W. SMITH

J. EVERETT BLUM

By J. Everett Blum

Counsel for Plaintiff

WM. FLEET PALMER

United States Attorney

E. H. MITCHELL

Assistant United States Attorney

EUGENE HARPOLE

Special Attorney,

Bureau of Internal Revenue

By E. H. Mitchell

Attorneys for Defendant

It Is So Ordered this 5th day of August, 1942.

C. E. BEAUMONT

Judge.

[Endorsed]: Filed Aug. 5, 1942. [32]

[Title of District Court and Cause.]

AMENDMENT TO COMPLAINT FOR REFUND
OF FEDERAL ESTATE TAXES ILLEGALLY
COLLECTED

Comes now the plaintiff and with leave of Court first had and obtained files the following amendment to her complaint on file herein, in lieu and instead of paragraph VII of plaintiff's complaint on file herein:

"VII.

That thereafter, to wit, on or about the ninth day of February, 1939, plaintiff as such executrix as aforesaid, duly and regularly filed with the said defendant as Collector of Internal Revenue of the United States for the Sixth District of California, for transmittal to the Commissioner of Internal Revenue of the United States, a claim for refund of federal estate tax erroneously and illegally assessed and collected in said matter in the sum of sixty-three thousand eight hundred twenty-five and [33] seventy-seven hundredths dollars (\$63,825.77) 'or such greater amount as is legally refundable', with interest thereon. A true copy of said claim for refund is attached hereto and by specific reference made a part hereof and marked Exhibit D.

That thereafter, and on or about the 4th day of April, 1940, plaintiff, as such executrix as aforesaid, duly and regularly filed with the said defendant an addition to said claim for refund, in which said addition to said claim for refund plaintiff set forth each of the two grounds claimed as error in her said claim for refund, and further set forth as a ground of error the fact that the Commissioner of Internal Revenue had erred in refusing to allow the full amount of deductions shown on the fed-

eral estate tax return filed and in allowing only the amount of deductions to the extent of the value of the probate estate of said decedent. That attached hereto and marked Exhibit F is a true and correct copy of said addition to said claim for refund, which said addition to said claim for refund is by this specific reference made a part hereof as if fully and completely set forth herein.

That thereafter, said Commissioner of Internal Revenue having audited said claim for refund and said addition thereto, did find and determine that there had not been an overassessment or overpayment of federal estate taxes against or by the Estate of Peter Ferry, the said decedent, or the plaintiff as such executrix, and did therefore reject said claim for refund and said addition thereto in its entirety by written rejection dated the 18th day of October, 1940. A true copy of said rejection in the form of a letter dated October 18, 1940, signed by D. S. Bliss, Deputy Commissioner of Internal Revenue, is attached hereto and by specific reference made a part hereof and marked Exhibit E. [34]

That more than six months have elapsed since the filing of said claim for refund and said addition thereto."

Dated this 29th day of December, 1942.

CLAUDE I. PARKER
RALPH W. SMITH
J. EVERETT BLUM

Counsel for Plaintiff

808 Bank of America Building
Los Angeles, California

[Verified.]

It Is Hereby Stipulated, by and between the parties hereto, through their respective counsel, that the hereinbefore Amendment to the Complaint on file herein may be filed.

CLAUDE I. PARKER

RALPH W. SMITH, and

J. EVERETT BLUM,

By Ralph W. Smith

Counsel for Plaintiff. [35]

LEO V. SILVERSTEIN,

United States Attorney

E. H. MITCHELL,

Assistant United States Attorney

EUGENE HARPOLE

Special Attorney

Bureau of Internal Revenue

By

Counsel for Defendant

It Is Hereby Ordered that the hereinbefore Amendment to the Complaint on file herein may be filed.

Dated this 8 day of March, 1943.

J. F. T. O'CONNOR

Judge of the Above Entitled Court. [36]

EXHIBIT "F"

STATEMENT OF PROTEST WITH RESPECT TO
DEFICIENCY CLAIMED IN FEDERAL ES-
TATE TAX PROPOSED TO BE ASSESSED
AGAINST CATHERINE B. FERRY, EXECU-
TRIX OF THE ESTATE OF PETER FERRY,
WHO DECEASED JUNE 16, 1935; AND

STATEMENT OF PROTEST WITH RESPECT TO
PROPOSED ACTION ON CLAIM FOR RE-
FUND FILED BY EXECUTRIX OF THE
AFORESAID ESTATE

Los Angeles, California,
April 5, 1940.

Hon. Guy T. Helvering,
Commissioner of Internal Revenue,
Washington, D. C.,

Through the Office of the Internal Revenue Agent in
Charge,
Los Angeles, California.

Sir:

Receipt is acknowledged of your letter bearing date February 20, 1940, carrying symbols MT-ET, bearing signature of George D. Martin, Internal Revenue Agent in Charge, which letter authorizes taxpayer, if dissatisfied with the tentative decision of the Commissioner of Internal Revenue therein made, to file within a period of thirty days her protest.

Receipt is also acknowledged of your letter bearing symbols above given, in which the time for filing said protest is extended for a period of fifteen days or, to wit, until the 5th day of April, 1940.

Protestant expresses her appreciation for the privilege of being permitted to register her dissatisfaction with the proposed determination of the Commissioner and for the extension granted within which to file this protest.

Protestant is dissatisfied with the proposed determination [37] tion and assigns errors specifically as follows:

First: That the Commissioner has erred in increasing the gross estate by including therein certain trusts specifically set out in the Commissioner's letter of August 4, 1937.

Second: That the Commissioner erred in increasing valuations of items of insurance as set out in his said letter of August 4, 1937.

Third: That the Commissioner erred in refusing to allow the full amount of deductions shown in the Federal Estate Tax Return filed and in allowing only the amount of deductions to the extent of the value of the probate estate.

That with respect to "First" and "Third" all of the statements contained in protest dated October 29, 1937, and heretofore filed, protesting the determinations made in your letter of August 4, 1937, together with all of the allegations contained in claim for refund executed and dated on or about February 10, 1939, and filed on or about February 20, 1939, are herein realleged and incorporated as though fully set forth herein and thereby made a part hereof.

That in addition, your protestant refers to the case of Hill, 24 B. T. A. 1144, and the decisions of the California Courts therein cited.

That with respect to the second error herein assigned your petitioner alleges that the premiums paid for the

insurance policies included in decedent's Federal Estate Tax Return and set forth in your letter of August 4, 1937, were paid for out of the community income of decedent and his wife acquired from and after July 29, 1927, and from the separate property of decedent and from the separate property of decedent's wife. That in that connection the facts are:

Decedent owned and operated a business known as Peter L. [38] Ferry, which business carried on a street paving enterprise. That Peter L. Ferry carried on said business as the sole proprietor and as an individual. That the total value of all assets of the business on February 29, 1927 was not in excess of \$25,000.00. That the physical assets of the business play a very minor part in the income produced by said business and received by said decedent. That the major factor in producing income from said business was the experience in said business of Peter L. Ferry, his contacts in getting the business, and his ability to carry out the contracts, his reputation in the business and his personal skill.

That all of the income derived by said Peter L. Ferry from the street paving and contracting business should be assigned to his personal services and none thereof to the physical assets of the business.

The said Peter L. Ferry and his wife carried a joint bank account at all times herein material, into which were deposited the community earnings of Peter L. Ferry and his wife, the separate earnings of his wife, and his own separate income. That from said joint bank account were paid all of the bills of decedent and his wife. That the amount of money in said bank account on August 1, 1927 was \$5,650.23.

That for the year 1928 Mrs. Peter L. Ferry filed a separate income tax return showing thereon income of \$22,474.71. That Peter L. Ferry filed a separate income tax return for the year 1928 showing income thereon of \$31,068.38.

For the year 1929 Mrs. Peter L. Ferry filed separate income tax return, showing income of \$7,408.55, and Peter L. Ferry filed separate income tax return for said year showing income of \$11,755.11.

That for the year 1930 Mrs. Peter L. Ferry filed separate income tax return showing income of \$10,388.50, and Peter L. Ferry [39] filed separate income tax return for said year, showing income of \$10,422.12.

For the year 1931 Mrs. Peter L. Ferry filed separate income tax return showing income of \$6,167.30, and Peter L. Ferry filed separate income tax return showing income of \$78.95.

For the year 1932 Mrs. Peter L. Ferry filed separate income tax return showing income of \$5,618.63, and for said year Peter L. Ferry filed separate income tax return showing loss of \$219.15.

For the year 1933 Mrs. Peter L. Ferry filed separate income tax return showing a loss of \$709.03, and Peter L. Ferry filed separate income tax return for said year showing income of \$2,026.40.

For the year 1934 Peter L. Ferry and Mrs. Peter L. Ferry filed a joint return showing a loss of \$24,702.20.

For the year 1935 separate returns were filed by Mrs. Peter L. Ferry and Peter L. Ferry. That the return of Peter L. Ferry showed a loss of \$32,714.90. That the copy of the return of Mrs. Peter L. Ferry for the year 1935 has not been located, although diligent search has

been made therefor, and the figures thereon can not at this time, therefore, be given.

That during the time in which the Commissioner of Internal Revenue would not allow a division of California community income to be divided between a husband and wife, decedent included in his return all of the community income. However, from records of said decedent, protestant is informed and believes and therefore alleges that decedent filed claims for refund with respect thereto, but decedent has no information upon which to base an allegation as to the outcome thereof and therefore respectfully directs your attention to the records of the Commissioner of Internal Revenue with respect to the action taken by the Commissioner on said claim or claims for refund. [40]

Protestant assumes that copies of decedent's and Mrs. Peter L. Ferry's income tax returns are available to the examining officer, but will be glad to show taxpayer's retained copies of the income tax returns referred to herein to the examining officer.

Premiums were paid on the insurance policies from the bank account of decedent and his wife in the American National Bank of Glendale, California, and the First National Bank of Glendale. That your protestant will furnish to the examining officer a statement of the payment of premiums on each of the insurance policies upon his request, showing payment of premiums from and after July 29, 1927 to the date of decedent's death.

From the foregoing, your protestant alleges that a sum greatly in excess of the amount claimed in the Federal Estate Tax Return should be excluded from the gross amount of insurance payable by reason of the death of said decedent. That your protestant is desirous of co-

operating fully with your office and will attempt to furnish such additional information as your examining officer may deem necessary, in so far as her ability will provide.

In conclusion, your protestant submits that only one-half of the corpus of the said trusts should have been included in decedent's gross estate; that a sum greatly in excess of that claimed in the Federal Estate Tax Return should have been excluded from the insurance payable by reason of decedent's death; that the deductions taken by the estate of decedent should have been allowed in full and should not have been limited to the amount of debts and deductions payable out of said probate estate.

Protestant assumes that with the additional certificate showing the total amount of inheritance tax paid or payable to the State of California, that the alleged deficiency shown in your letter of February 20, 1940 will be eliminated.

From the foregoing, therefore, it is urgently requested that reconsideration be made by your office with respect to the [41] proposed determinations incorporated in your letter of August 4, 1937, and the proposed determinations reported in your letter of February 20, 1940, and that a statement of protest of protestant dated October 29, 1937, and the claim for refund heretofore filed herein, and this protest be given your deep consideration and that upon such reconsideration in the light of the foregoing, protestant's claim be allowed.

Protestant desires an oral hearing.

Respectfully submitted,

CATHERINE B. FERRY

Executrix of the Estate of Peter Ferry, Deceased.

* * * * *

[Title of District Court and Cause.]

ANSWER TO AMENDMENT TO PLAINTIFF'S
COMPLAINT

Comes Now the defendant in the above-entitled action, and in answer to the Amendment of Plaintiff's Complaint, entitled Paragraph "VII", admits, denies and alleges:

VII.

Admits that on or about the 9th day of February, 1939, plaintiff filed with the Collector, named, her claim for refund of Federal estate taxes; and admits that Exhibit D, attached to plaintiff's complaint, is a true copy thereof.

Admits that Exhibit E attached to plaintiff's complaint is a true copy of a letter dated October 18, 1940, from Deputy Commissioner D. S. Bliss to the plaintiff; and admits that in and by such letter the Commissioner rejected plaintiff's said refund claim, Exhibit D, attached to her complaint. [44]

Denies that Exhibit F attached to plaintiff's amendment to her complaint and entitled "Statement of Protest", was "an addition to", an amendment of, or was any part of, her said refund claim, Exhibit D; denies that said "Statement of Protest" (Exhibit F) was considered by the Commissioner in passing upon such refund claim; and denies that the letter of rejection (Exhibit E) was to any extent whatever responsive to said "Statement of Protest".

Denies all other allegations of said Paragraph VII not hereinbefore expressly admitted.

Wherefore, having fully answered, defendant prays that he be hence dismissed with his costs in this behalf expended.

LEO V. SILVERSTEIN

United States Attorney

By E. H. Mitchell

Assistant United States Attorney

Attorneys for Defendant.

[Endorsed]: Filed Mar. 18, 1943. [45]

[Title of District Court and Cause.]

SECOND AMENDMENT TO COMPLAINT FOR
REFUND OF FEDERAL ESTATE TAXES
ILLEGALLY COLLECTED

Comes now the plaintiff and with leave of Court first had and obtained, files the following amendment to her complaint on file herein, in lieu and instead of Paragraph IX of plaintiff's complaint on file herein:

"IX.

Prior to the death of decedent, decedent and his wife made certain transfers of their property in trust. The said trusts are as follows:

Trust No. 5869, created February 10, 1925, in which the Security Trust and Savings Bank, a corporation, was named as Trustee, and in which the decedent and his wife were named as Trustors;

Trust No. 2012, created April 9, 1925, in which the [47] Citizens National Trust and Savings Bank was the Trustee, and the decedent and his wife were the Trustors;

Trust No. SS 4358, created October 9, 1925, in which the Pacific Southwest Trust and Savings Bank was the Trustee, and in which the decedent and his wife were the Trustors;

Trust No. 1052, created November 2, 1925, in which the Title Guarantee and Trust Company was named Trustee, and in which the decedent and his wife were named the Trustors;

Trust No. 6204, created June 5, 1930, in which the Citizens National Trust and Savings Bank of Los Angeles was named the Trustee, and in which the decedent and his wife were named the Trustors;

Trust No. 1080, created July 10, 1925, in which Title Guarantee and Trust Company, a corporation, was named Trustee, and in which Harry G. MacBain was Trustor;

That the Commissioner of Internal Revenue, in fixing the total estate tax liability due from the estate of said decedent, included the value of the and income available for distribution

Amendment allowed J. F. T. O'Connor, Judge entire corpus \wedge of each of said trusts, with the exception of said Trust No. 1080, said Commissioner of Internal Revenue in fixing the total estate tax liability due from the estate of said decedent, in-

cluded the entirety of a one-tenth (1/10) interest thereof;

That respecting said Trust No. 1080, said decedent and his wife acquired a one-tenth (1/10) interest therein as joint tenants with right of survivorship by written assignment of July 11, 1925, and on May 28, 1925 said decedent transferred his one-twentieth (1/20) interest in said trust to his daughter and two sons, Mary Alice Diener, James L. Ferry, and Peter Ferry, Jr.; [48]

That no part of said Trust No. 1080 was includable in the gross estate of said decedent;

That respecting the remainder of said trusts, not exceeding one-half (1/2) of the value of the corpus of each of said trusts was includable in the gross estate of said decedent."

Dated this 1st day of April, 1943.

CLAUDE I. PARKER

RALPH W. SMITH

J. EVERETT BLUM

Counsel for Plaintiff,

808 Bank of America Building,
Los Angeles, California.

[Verified.]

[Endorsed]: Filed Apr. 5, 1943. [49]

[Title of District Court and Cause.]

ANSWER TO SECOND AMENDMENT TO
PLAINTIFF'S COMPLAINT

Comes Now the defendant in the above-entitled action and, in answer to the amendment of plaintiff's complaint entitled "Paragraph IX", admits, denies and alleges:

IX.

In answer to Paragraph IX thereof, defendant denies that decedent and his wife made any of the transfers therein described; and denies that any of said transfers constituted transfers of property of decedent and his wife. In that connection, defendant alleges that all of such transfers were made by decedent alone and were transfers of property of decedent only. Defendant denies that decedent was the owner of only a one-half interest in the corpus of said trusts; denies that decedent's wife owned the other one-half of the corpus of each of said trusts; and denies that only one-half the value of the corpus of each of said trusts was includable in decedent's gross estate for [52] Federal estate tax purposes.

Further answering said Paragraph IX, defendant admits that in fixing the total estate tax liability of decedent's estate, the Commissioner included the value of the entire corpus of each of the first five trusts referred to in said Paragraph. Defendant admits that decedent and his wife acquired a 1/10 beneficial interest in Trust No. 1080 as joint tenants with the right of survivorship by written assignment dated July 11, 1925. Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegation contained in said Paragraph to the effect that on May 28, 1935, decedent transferred a 1/20 or any other interest in said Trust

No. 1080 to his daughter and two sons. In the alternative defendant alleges that if such transfer was made by decedent on the 28th day of May, 1935, it was made 19 days before decedent's death and while decedent was seriously incapacitated with cancer; and that said gift was made without consideration and in contemplation of death.

Further answering said Paragraph IX, defendant alleges that each of the first five transfers described therein was made by the decedent to the extent of 100% thereof and were then intended by him to take effect in possession and enjoyment at or after his death; that in and by each such transfer decedent retained for the remainder of his life the possession and enjoyment of the income from the property so transferred, together with the right to designate the persons who should enjoy the property and the income therefrom; and that the enjoyment of such transferred property, including both corpus and income, was at the date of his death subject to changes through the exercise by him of retained powers to alter, amend and revoke the said transfers and the terms of said trusts.

Wherefore, having fully answered, defendant prays that he be hence dismissed with his costs in this behalf expended.

LEO V. SILVERSTEIN,
United States Attorney.

E. H. MITCHELL,
Assistant United States Attorney.

By E. H. Mitchell,
Assistant United States Attorney,
Attorneys for Defendant.

[Title of District Court and Cause.]

MEMORANDUM

This is an action by Catherine B. Ferry, as Executrix of the Last Will and Testament of Peter Ferry, deceased, to recover \$63,825.77 claimed as overpayment to the Collector of Internal Revenue for inheritance taxes. Peter Ferry died testate on June 16, 1935. The Ferrys were married January 31, 1906 and became residents of California in 1909, where they have resided ever since. The Executrix, the widow, filed a federal estate tax return showing net federal estate tax of \$16,905.17, which was paid by the estate, and thereafter certain other sums, upon demand of the Collector of Internal Revenue, totaling \$88,405.17. This amount includes the \$16,905.17. In addition to these payments, the Collector of Internal Revenue made a tentative deficiency assessment of \$61,183.19, making a total assessment of \$149,588.36. This did not make allowance for the inheritance tax to be paid to the State of California, which was later allowed.

The Executrix and widow did actually pay to the Collector of Internal Revenue, upon demand, the sum of \$126,546.36 and now the Executrix demands a refund of the amount stated: \$63,825.77. [55]

This action was tried, argued at length before the court, and extensive briefs filed.

The court finds for the plaintiff.

Judgment is awarded in the sum of \$63,825.77, with interest and costs.

Plaintiff will prepare findings of fact and conclusions of law.

Dated this 10th day of December, 1943 at Los Angeles, California.

J. F. T. O'CONNOR
U. S. District Court

[Endorsed]: Filed Dec. 10, 1943. [56]

[Minutes: Monday, January 31, 1944]

Present: The Honorable J. F. T. O'Connor, District Judge.

This cause coming on for hearing of motion of plaintiff that an order be entered substituting Ethel Strickland Rogan, Executrix of the Estate of Nat Rogan, deceased, as the defendant in the place of Nat Rogan, deceased, former Collector of Internal Revenue for the Sixth District of California, pursuant to Notice filed January 21, 1944; John Moore Robinson, Esq., appearing as counsel for the plaintiff; Walter S. Binns, Esq., appearing as counsel for the defendant:

Attorney Robinson moves that the above motion be granted, and Attorney Binns not objecting, it is by the Court ordered that the said motion be, and it is, granted. [57]

In the District Court of the United States in and for the
Southern District of California
Central Division

No. 2106-O'C

CATHERINE B. FERRY, as Executrix of the Last
Will and Testament of PETER FERRY, Deceased,
Plaintiff

v.

ETHEL STRICKLAND ROGAN, Executrix of the
Estate of NAT ROGAN, Deceased,
Defendant

DEFENDANT'S OBJECTIONS TO FORM OF PRO-
POSED FINDINGS AND CONCLUSIONS
(Local Rule 7(a))

The defendant objects to the form of the Findings and Conclusions drafted and proposed by plaintiff's counsel and served on the 25th day of February, 1944, upon the grounds that the same are neither clear nor complete and fail to comply with the requirements of Rule 52(a), Rules of Civil Procedure, in the following particulars:

1. Proposed Findings V (p. 3) and XLV (p. 14) are identical. One or the other should be eliminated as surplusage.
2. Proposed Findings VI (p. 3) and XLVI (p. 15) are identical. One or the other should be eliminated as surplusage.
3. The same is true of proposed Findings VII (p. 3) and XLVII (p. 15).
4. The same is true of Findings VIII (p. 4) and XLVIII (p. 15).

5. Proposed Findings VII (p. 3) and XLVII (p. 15) are too vague and general, fail to comply with Rule 52(a) and, if reviewed, would require the reviewing Court to refer to and carefully read and study a separate document in order to [58] understand their meaning.

The proposed Finding to the effect that all of the matters contained in Defendant's Pre-Trial Brief were "accepted" by the Commissioner is vague, unintelligible and meaningless.

The two Findings are not supported by the Court's Order and, incidentally, are supported by no evidence whatsoever. The record is silent as to whether the entire contents of Defendant's Pre-Trial Brief in this case were "fully considered, accepted and acted upon by the Commissioner" prior to the commencement of this action and before the Pre-Trial Brief was either conceived or written.

6. Proposed Findings VIII (p. 4) and XLVIII (p. 15) are likewise too vague, too general, fail to comply with Rule 52(a), and are not supported by the Court's Order awarding judgment in favor of the plaintiff.

The proposed Finding that the "grounds" upon which the Court's decision in this case are based were "each and all fully considered, accepted and acted upon by the Commissioner" is too general and unintelligible unless each and all of the consistent grounds, upon which the Court's proposed decision herein is based, are "specially" found or "separately stated", as required by Rule 52(a).

The proposed Finding that "the grounds of recovery adduced at the trial" were similarly fully considered and acted upon before the commencement of this action, is also too vague and unintelligible unless each and all of such grounds adduced at the trial are "specially found"

or "separately stated". To understand this proposed blanket finding, a reviewing Court would be compelled to read every word of the lengthy Reporter's Transcript.

The phrase "accepted . . . by the Commissioner" is also vague, unintelligible and meaningless.

Each and all of the foregoing objections apply equally to the proposal that the Court find that the Commissioner, who acted prior to the commencement of this action, was not deceived or misled into taking such action by the Court's recent decision upon "all grounds" relied upon by the plaintiff. Such proposal, in effect, asks the Court to find that it, the Court, did not deceive and mislead the Commissioner. It is submitted that ingenuity in the drafting of Findings and [59] Conclusions should not be carried to such extreme.

7. That portion of proposed Finding IX (p. 4) to the effect that the Commissioner exacted an unspecified amount of taxes "erroneously and unlawfully", is too general and too vague, and is a blanket legal conclusion and not a fact or facts "specially" found, as required by Rule 52(a). Even if treated as conclusions of law, such conclusions are not "stated separately" as required by the same rule.

The four amounts of "undistributed income" referred to in the same Finding IX should be "specially" found, as required by Rule 52(a).

8. Proposed Finding X (p. 5) is not supported by the Court's Order awarding judgment in favor of the plaintiff.

Such proposed Finding is confusing in that it cannot be determined therefrom whether the transfers referred to are transfers to the five trustees or transfers to decedent's wife.

Incidentally, the same proposed Finding is unsupported by the evidence and is inconsistent with plaintiff's refund claim and with plaintiff's complaint.

9. Proposed Findings XI to XV, inclusive, all relating to Trust 1080, are not supported by the Court's Order awarding judgment in favor of the plaintiff.

10. Proposed Findings XVI to XXXII, inclusive (pp. 6-11), are not supported by the Court's Order awarding judgment in favor of the plaintiff, and are wholly inconsistent with and contradict plaintiff's return, her refund claim and her complaint herein.

11. Of said proposed Findings, numbers XX to XXVII, inclusive, and numbers XXIX to XXXII, inclusive, relating to equal co-ownership by the spouses of all property standing in the name of the decedent, alone, are incidentally not supported by the evidence. [60]

12. Proposed Findings XXXV to XLIV, inclusive (pp. 12-14), are not supported by the Court's Order awarding judgment in favor of the plaintiff, and are wholly inconsistent with and contradict the plaintiff's return, her refund claim and her complaint.

Incidentally, they are not supported by the evidence.

13. Proposed Finding XLIX (pp. 15-16) is too vague and general and fails to comply with said Rule 52(a). To understand it, a reviewing Court would be compelled to carefully read and study three separate documents, the very burden that Rule 52(a) was intended to prevent.

The truth or falsity of each allegation of fact referred to in proposed Finding XLIX should be found specially, as required by the rule.

This proposed Finding is not supported by the Order of the Court awarding judgment in favor of the plaintiff.

14. Proposed Conclusions I to VII, inclusive (pp. 16-17), are not supported by the Court's Order awarding judgment in favor of the plaintiff.

Such proposed Conclusions are unsupported by any valid Finding or Findings that can be made herein and are contradictory of and inconsistent with the plaintiff's tax return, her refund claim and her complaint.

15. Proposed Conclusions VIII to X, inclusive, are not supported by the Court's Order herein or by any valid Finding or Findings that can be made.

16. Proposed Conclusion XV-e (p. 20) asks the Court to exceed its jurisdiction and goes beyond the Court's Order awarding judgment in favor of the plaintiff. The Court is without power to award "attorneys' fees" to either party in a Federal tax refund suit. [61]

Omissions

The proposed decision in this case will not be complete and will not comply with the provisions of Rule 52(a) unless the Court makes Findings and Conclusions, either affirmative or negative, upon the following issues of law and fact:

17. An express Finding specifying the exact grounds for refund raised by plaintiff in her claim for refund.

18. An express Finding specifying the exact grounds for refund raised by plaintiff in this suit.

19. An express Finding pointing out the precise act or acts of commission or omission of the Collector, of the Commissioner or of any Government agent or agents, which act or acts constituted a waiver of the several variances between the grounds for refund raised in the claim and those raised in this suit.

20. An express Finding pointing out the precise act or acts of commission or omission of the Collector, of the Commissioner or of any other Government agent, which act or acts constituted a waiver of the sufficiency of the refund claim to support this suit.

21. An express Finding as to whether any of the properties placed in the first five trusts was or were, as plaintiff contends, community property and, if so, whether such property or properties was or were traceable to the toil or talent of one of the spouses exerted after July 29, 1927.

22. An express Finding or Conclusion as to whether, under California law, wives are required to join in the transfer of community real property standing of record in the sole names of their husbands.

23. An express Finding or Conclusion as to whether, after filing her complaint herein, plaintiff abandoned her contention that the property that went into the first five trusts and some of the funds used to pay life insurance premiums were California community property.

24. If not, whether either spouses ever received any income attributable to his or her toil or talent exerted after July 29, 1927.

25. An express Finding or Conclusion as to whether the plaintiff, who [62] knowingly failed to pay to the Federal Government substantial taxes upon her taxable income, has come into Court in this case with clean hands.

26. An express conclusion as to whether this Court has jurisdiction to consider and decide the following claims

made by the plaintiff for the first time after the commencement of this suit, to wit:

(a) The claim that a substantial portion of the real properties that went into Trust No. 6204 was theretofore held by the spouses as joint tenants.

(b) The claim that several of the parcels of real property that went into said Trust No. 6204 were theretofore held by the spouses as tenants in common.

(c) The claim that all properties that went into the first five trusts were theretofore co-owned by the spouses in equal shares as his and her separate property.

(d) The claim that the spouses, prior to 1909, entered into an oral and binding contract to the effect that all property acquired by decedent during marriage should be owned equally by them as his and her separate property.

(e) The claim that any of the wife's separate property was used to pay life insurance premiums.

(f) The claim that half the value of all the first five trusts was not includible in the gross estate.

(g) The claim that half the value of all the life insurance policies was not includible in the gross estate.

27. An express Finding or Conclusion as to whether plaintiff's refund claim "set forth in detail and under oath each ground upon which a refund is claimed" by plaintiff in this suit.

28. An express Finding or Conclusion as to whether plaintiff's refund claim "set forth in detail under oath . . . facts sufficient to apprise the Commissioner of the exact basis" of all the claims made by the plaintiff in this suit. [63]

29. An express Finding or Conclusion as to whether the plaintiff's refund claim "clearly set forth", under oath, all the material facts relied upon by her in support of this suit.

30. An express Conclusion as to whether, under the law, the Commissioner is compelled to rely at his peril upon sworn representations made by taxpayers in their returns and refund claims.

Dated: March 1, 1944.

Respectfully submitted,

CHARLES H. CARR

United States Attorney

E. H. MITCHELL

Assistant United States Attorney

WALTER S. BINNS

Assistant United States Attorney

EUGENE HARPOLE,

Special Attorney

Bureau of Internal Revenue

By E. H. Mitchell

Attorneys for Defendant

[Title of District Court and Cause.]

CERTIFICATE OF PROBABLE CAUSE

The above entitled Court does hereby certify that Nat Rogan, as Collector of Internal Revenue of the Sixth District of California, acted with probable cause, and also acted under the direction of the United States Secretary of the Treasury, in collecting the Federal Estate Tax from Plaintiff in the above entitled matter, claimed to be due by reason of the death of Peter L. Ferry, deceased, for the refund and recovery of which judgment has heretofore been rendered by the above entitled Court in favor of the above named Plaintiff and against the Defendant above named.

Dated at Los Angeles, California, this 19 day of February, 1944.

J. F. T. O'CONNOR

Judge of the Above Entitled Court [65]

Approved as to Form, this 26th day of February, 1944.

CHAS. H. CARR

United States Attorney

E. H. MITCHELL

Asst. United States Attorney

By E. H. Mitchell

Attorneys for Defendant

[Endorsed]: Filed Apr. 19, 1944. [66]

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above entitled cause having come on regularly to be heard the 1st day of June, 1943, before the Honorable J. F. T. O'Connor, Judge Presiding, sitting without a jury, a jury having been expressly waived, plaintiff appearing by her attorneys, Messrs. Claude I. Parker, Ralph W. Smith and J. Everett Blum, by John Moore Robinson; Nat Rogan, being then designated as defendant herein, appearing by his attorney E. H. Mitchell, and the matter having been heard upon the issues raised by the complaint, and amendments thereto, and the answers thereto, and evidence both oral and documentary having been introduced, and the cause having been submitted to the Court for decision, and the defendant Nat Rogan, having resigned on the 30th day of June, 1943, and deceased on the 8th day of August, 1943, and Ethel Strickland Rogan, as executrix of the Estate of said Nat Rogan having been [67] duly substituted as the party defendant herein, and the Court having considered the facts and the law, and being fully advised in the premises, now makes its findings of fact as follows:

I.

That all the facts contained in that certain "Stipulation Relative to Facts," made on the 12th day of April, 1943, and duly executed by counsel for all of the parties herein, and it is true that an exact copy of the Claim for Refund filed by plaintiff on the 9th day of February, 1939, is attached to said Stipulation Relative to Facts, and is marked Exhibit E.

II.

All of the facts alleged in Paragraphs I, II, III and VI of plaintiff's complaint, having been expressly admitted by defendant's amended answer, the Court finds each and every allegation in said paragraphs of said complaint to be true.

III.

It is true that on or about the 4th day of April, 1940, plaintiff as executrix of the Last Will and Testament of Peter Ferry, deceased, duly and regularly filed with Nat Rogan, Collector of Internal Revenue of the Sixth District of California, a protest which constituted an addition and amendment to said claim for refund, in which said addition and amendment to said claim for refund the plaintiff set forth, in addition to the grounds claimed as error in said claim for refund, a separate and additional ground of error, i. e., the fact that the Commissioner of Internal Revenue had refused to allow the full amount of deductions shown on the Federal Estate Tax return which had been filed for said estate, and that the said Commissioner allowed deductions only to the extent of the value of the probate estate of said decedent.

IV.

It is true that a true copy of said amendments and addition to said claim for refund is attached to the amendment to plaintiff's [68] complaint on file herein, and that the Commissioner of Internal Revenue in making his ruling, upon said claim for refund, as amended, fully considered, accepted and acted upon said protest filed

on or about the 4th day of April, 1940, as aforesaid, and did allow as proper deductions from the gross estate of said decedent the said deductions claimed in said protest, and that more than six months did elapse from the date of the filing of said protest and the date of the filing of the within action.

V.

It is true that on or about the 4th day of April, 1940, plaintiff filed a protest with the Commissioner of Internal Revenue, bearing date April 4, 1940, and that said protest was so filed at the invitation of said Commissioner of Internal Revenue for his consideration in rendering his final determination of any deficiency against the estate of said Peter L. Ferry, deceased, and that a true copy of said protest is attached to the plaintiff's amendment to Complaint for Refund of Federal Estate Taxes Illegally Collected.

[Deleted as request of Plaintiff. J. F. T. O'Connor, Judge.]

VI.

It is true that said Commissioner of Internal Revenue in the rendition of his determination as to the liability of said estate of Peter L. Ferry for Federal Estate Tax fully considered, accepted and acted upon each and all of the grounds, reasons, facts, and other matters contained in said claim for refund and in said protest dated April 4, 1940.

[Deleted at request of Plaintiff. J. F. T. O'Connor, Judge.]

VII.

It is true that each and all the grounds, reasons, facts and other matters set forth and contained in defendant's Pre-Trial Brief for Judge O'Connor on file herein were fully considered, accepted, and acted upon by the Commissioner of Internal Revenue in the rendition of his determination of the liability of said Estate of Peter L. Ferry for Federal Estate Tax. [69]

[Deleted at request of Plaintiff. J. F. T. O'Connor, Judge.]

VIII.

It is true that the grounds of recovery upon which the decision in this matter by the within court are based, and the grounds of recovery adduced at the trial of the issues in the within matter were each and all fully considered, accepted, and acted upon by the Commissioner of Internal Revenue in the rendition of his determination of the liability of said estate of Peter L. Ferry for Federal Estate Tax and that the defendant and the Commissioner of Internal Revenue was not at any time or in any wise or manner deceived, misled, or imposed upon by the trial of and decision upon each and all of said grounds relied upon by the plaintiff.

[Deleted at request of Plaintiff. J. F. T. O'Connor, Judge.]

IX.

It is true that the Commissioner of Internal Revenue of the United States erroneously and unlawfully exacted from plaintiff a Federal Estate tax on the estate of Peter Ferry, deceased, in that the Commissioner of Internal Revenue increased the gross estate of said decedent by including therein the following trusts, and more

specifically referred to in said Stipulation Relative to Facts, in the following amounts:

Trust No. 5869, Security Trust & Savings Bank, Corpus and undistributed income	\$108,363.36
Trust No. 2021, Citizens Nat'l Trust & Savings Bank, Corpus and undistributed income	82,289.16
Trust No. SS4358, Pacific Southwest Trust & Savings Bank, Corpus and undistributed income	95,182.02
Trust No. 1052, Title Guarantee & Trust Company, Corpus and undistributed income	122,604.80
Trust No. 6204, Citizens Nat'l Trust & Savings Bank, Corpus	19,580.37
1/10th interest on Trust No. 1080, Title Guarantee and Trust Company, Corpus	2,547.74
	[70]

X.

It is true that one-half ($1/2$) of the interest in all of said trusts included in the gross estate of said decedent by said Commissioner of Internal Revenue, was never at any time transferred by the decedent within the purview of Section 302 of the Revenue Act of 1926, as amended and all subdivisions thereof.

XI.

It is true that during his lifetime the decedent and the plaintiff, Catherine B. Ferry, owned as Joint Tenants with Right of Survivorship, an undivided $1/10$ th interest in said Trust No. 1080 under which the Title Guarantee and Trust Company was trustee, and that prior

to his said death, said decedent did transfer and grant his one-half ($1/2$) interest, i. e., $1/20$ th interest in said trust, to three of his children and that at the time of his said death, said decedent did not have any interest in said Trust No. 1080.

XII.

It is true that at the time of said transfer of said interest in said Trust No. 1080 and at all times during his lifetime, said decedent was a very energetic, hard working individual and at all times up to the time of said transfer and for sometime thereafter possessed a hopeful mental outlook on life, and was mentally and physically in good condition, and was continually planning for the future.

XIII.

It is true that although decedent shortly before his death suffered with a skin cancer, he had no apparent apprehension of death therefrom, and that decedent was operated on for said cancer about six days before his death and shortly prior thereto, the operating physician had told decedent that decedent had no more chance of dying from the operation than he had of being killed by an automobile walking across Alvarado Street. [71]

XIV.

It is true that the decedent's sole motives in transferring said $1/20$ th interest in said Trust No. 1080 under which Title Guarantee and Trust Company was trustee, were that decedent had been accused by other beneficiaries under said trust, of renting for his personal gain, a portion of the trust properties and that to quell this disharmony, decedent desired to divest himself of his interest in said trust and for the reason that decedent had

been forced to pay numerous assessments on his beneficial interest in this said trust, and was fearful of additional assessments on this interest, and to avoid these liabilities, the transfer of said interest was made.

XV.

It is true that said interest in said Trust No. 1080 under which Title Guarantee and Trust Company was trustee, was not transferred by decedent in contemplation of his death, or with deferred possession or enjoyment in the decedent or in lieu of testamentary disposition, or within the purview of Section 302 of the Revenue Act of 1926, as amended, and all sub-sections thereof.

XVI.

It is true that the said parcels of real property referred to in the Stipulation Relative to Facts on file herein on Pages 18, 19, 20, 21, 22, 23, 24 and 25 thereof and designated as parcels 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 13, 15, 16, 17, 18, 19, 20, 21, 23, 24, 27, 28, 29, 34, 35 and 38 were each and all acquired in California by said decedent, Peter L. Ferry, and by his wife, Catherine B. Ferry, as Joint Tenants with Right of Survivorship and each and all of said parcels of real property continued to stand in the names of said decedent, Peter L. Ferry, and his said wife, Catherine B. Ferry, as Joint Tenants with Right of Survivorship up to and including the times of the transfer thereof by them to Citizens National Trust and Savings Bank, trustee under said Trust No. 6204, and at [72] the respective times of the transfer of each and all of said parcels to Citizens National Trust and Savings Bank as said trustee, each and all of said parcels of real property stood in the names of said decedent, Peter L. Ferry, and his said

wife, Catherine B. Ferry, as Joint Tenants with Right of Survivorship.

XVII.

It is true that said parcels of real property referred to in the Stipulation Relative to Facts on file herein on Pages 20 and 23 thereof, and designated as parcels 14, 30 and 32, were each and all acquired in California by said decedent, Peter L. Ferry, and by his wife, Catherine B. Ferry, as tenants in common, and each and all of said parcels of real property continued to stand and be in the names of said decedent, Peter L. Ferry, and his wife, Catherine B. Ferry, as tenants in common, up to and including the times of the transfer thereof by them to Citizens National Trust and Savings Bank, trustee, under said Trust No. 6204; and at the respective times of the transfers of each and of all said parcels to Citizens National Trust and Savings Bank, as said trustee, each and all of said parcels of real property stood in the names of said decedent, Peter L. Ferry, and his said wife, Catherine B. Ferry, as tenants in common.

XVIII.

It is true that said 27 parcels of real property so transferred to said Trust No. 6204, under which the Citizens National Trust and Savings Bank was trustee, were each and all immediately prior to the transfer thereof, standing in the names of said decedent, Peter L. Ferry, and his said wife, Catherine B. Ferry, as Joint Tenants with Right of Survivorship, and that in finally determining the gross estate of said decedent, the said Commissioner of Internal Revenue erroneously included the entirety of the value of said property and each parcel thereof in the total sum of one hundred seventy thousand, three hundred and fifteen dollars, [73] \$170,315.00).

XIX.

It is true that the said three parcels of real property transferred to said Trust No. 6204 under which the Citizens National Trust and Savings Bank was trustee, were each and all immediately prior to the transfer thereof to said trust, standing in the names of decedent, Peter L. Ferry, and his said wife, Catherine B. Ferry, as tenants in common and that in finally determining the gross estate of said decedent, Peter L. Ferry, the Commissioner of Internal Revenue erroneously included the entirety of the value of said three properties in the sum of four thousand eight hundred and twenty dollars (\$4,820.00).

XX.

It is true that immediately prior to the marriage of plaintiff, Catherine B. Ferry, and said decedent, Peter L. Ferry, in the year 1906, they entered into an agreement with each other to the effect that immediately upon marriage they would become equal financial partners and that all earnings and all property theretofore or thereafter acquired by either or both of them, would be owned equally and 50-50 by them and that all property acquired by either or both of them would be owned jointly and all losses by either or both of them would be shared equally.

XXI.

It is true that said agreement consummated by said plaintiff and said decedent immediately upon their marriage, continued in effect during the remainder of said decedent's life.

XXII.

It is true that in or about the year 1909, said decedent and said plaintiff came to the State of California, and from and after said time continually resided in as husband and wife, and were residents of the State of California until the time of decedent's death, and that upon arrival in said State of California [74] in or about the year 1909, said decedent and said plaintiff reaffirmed in full the entirety of said oral property agreement theretofore entered into, and all property acquired by them or either or both of them at all times thereafter was acquired under the terms of and subject to said agreement.

XXIII.

It is true that said Trust No. 5869 under which the Security Trust and Savings Bank, a corporation, was named trustee, was created equally on or about February 10, 1925, by said decedent and his said wife, Catherine B. Ferry, as trustors, and it is true that said plaintiff, Catherine B. Ferry, as wife of said decedent, owned one-half (1/2) of all property transferred to said trust.

XXIV.

It is true that Trust No. 2012, under which the Citizens National Trust and Savings Bank was trustee, was created equally on or about April 9th, 1925, by said decedent, and his said wife, Catherine B. Ferry, as trustors, and said Catherine B. Ferry, as the wife of decedent, owned one-half (1/2) of all property transferred to the trust.

XXV.

It is true that Trust No. SS-4358 under which the Pacific Southwestern Trust and Savings Bank was trustee,

was created equally on or about October 9, 1925, by said decedent and his said wife, Catherine B. Ferry, as trustors, and said Catherine B. Ferry, as wife of decedent, owned one-half of all property transferred to said trust.

XXVI.

It is true that Trust No. 1052, under which the Title Guarantee and Trust Company was trustee, was created equally on or about the 2nd day of November, 1925, by said decedent and his said wife, Catherine B. Ferry, as trustors, and said Catherine B. Ferry, as wife of decedent, owned one-half ($1/2$) of all property [75] transferred to said trust.

XXVII.

It is true that Trust No. 6204 under which the Citizens National Trust and Savings Bank of Los Angeles was trustee, was created equally on or about June 5, 1930, by said decedent and his wife, Catherine B. Ferry, as trustors, and said Catherine B. Ferry, as wife of decedent, owned one-half ($1/2$) of all property at any time transferred to said trust.

XXVIII.

It is true that by the creation of each and all of said trusts, said decedent, Peter L. Ferry, and his said wife, Catherine B. Ferry, settled in writing their property rights in respect to the corpuses of each and all of said trusts, and that said Catherine B. Ferry, parted with good, sufficient and adequate consideration for the execution and creation of each and all of said trusts.

XXIX.

It is true that during the entire married life of said Peter L. Ferry and his said wife, Catherine B. Ferry, said decedent at all times dealt with Catherine B. Ferry as

a business partner and during the entirety of their married life, it was decedent's custom and practice to request and secure her consent and advice on almost all sizable business transactions, and said Catherine B. Ferry, examined, on most occasions, real property prior to the acquisition thereof, and on numerous occasions said decedent admitted and reiterated to said Catherine B. Ferry that one-half (1/2) of all property was hers.

XXX.

It is true that on numerous occasions said decedent admitted to his son, James L. Ferry, that all of the property possessed by decedent and Catherine B. Ferry, was owned equally by them. [76]

XXXI.

It is true that in the year 1931, the contracting business operated under the name "Peter L. Ferry" was sold to James L. Ferry, son of decedent and Catherine B. Ferry, and that prior to the sale, said decedent told his son, James L. Ferry, that before said sale could be made, it would be necessary that the consent of plaintiff, Catherine B. Ferry, be secured as she owned one-half (1/2) of said business.

XXXII.

It is true that the Commissioner of Internal Revenue in his final determination of the gross estate of said decedent, Peter L. Ferry, included therein all property owned by decedent and his wife, Catherine B. Ferry, and each of them, and all property owned by decedent or Catherine B. Ferry, or either of them, and all property in which decedent and his wife, Catherine B. Ferry, and each of them or either of them had any interest, beneficial or otherwise.

XXXIII.

It is true that at the time of decedent's death, there were issued and outstanding and in full force and effect, certain life insurance policies issued on the life of decedent and payable to individually named beneficiaries, i. e., his wife or children, in the sum of three hundred thirty-one thousand, six hundred thirty-two dollars and seventy-two cents, (\$331,632.72) and no part of which policies was payable to or receivable by an executor or the estate of said decedent.

XXXIV.

It is true that the Commissioner of Internal Revenue, in his final determination of the gross estate of said decedent, included the entirety of the value of said insurance upon the life of said decedent in the total sum of three hundred thirty-one thousand, six hundred thirty-two dollars and seventy two cents. [77]

XXXV.

It is true that each and all of the premiums on each and all of said insurance policies were always paid by checks drawn on joint bank accounts of said decedent and his wife, Catherine B. Ferry, and some of these checks used to pay for these premiums on said policies were issued by his said wife, Catherine B. Ferry, as co-owner of said bank accounts.

XXXVI.

It is true that all income of said decedent, Peter L. Ferry, and/or from his said wife, Catherine B. Ferry, including the income from the hereinbefore described trusts, from every source whatsoever and all other monies received from any source by said decedent and/or his said wife, Catherine B. Ferry, was in accordance with an

understanding established by them always deposited to the same joint bank accounts from which the aforesaid checks for the payment of premiums, and each of them on the aforesaid policies and each of them was drawn, and all of said income and monies were unidentifiably commingled therein.

XXVII.

It is true that for the period commencing with the date of the creation of said Trust No. 5869 under which the Security Trust and Savings Bank was trustee, and ending with the date of decedent's death, distributions in the name of Catherine B. Ferry were made from said trust in the total sum of seventy-eight thousand twenty-six dollars and seventy-eight cents, (\$78,026.78) all of which said monies were, upon receipt thereof, deposited to said joint bank accounts.

XXXVIII.

It is true that for the period commencing with the date of the creation of said Trust No. 2012 under which the Citizens National Trust and Savings Bank was trustee, and ending with the date of decedent's death, distributions in the name of Catherine B. [78] Ferry were made from said trust in the total sum of eleven thousand four hundred seventy-five dollars and eighty-six cents (\$11,475.86) all of which said monies were, upon receipt thereof, deposited to said joint bank accounts.

XXXIX.

It is true that for the period commencing with the date of the creation of said Trust No. SS-4358, under which the Pacific Southwestern Trust and Savings Bank was trustee, and ending with the date of decedent's death, distributions in the name of Catherine B. Ferry were made from said trust in the total sum of one thousand

five hundred sixty-two dollars, (\$1,562.00), and during said period from said trust there was distributed in the names of Catherine B. Ferry and Peter L. Ferry, jointly, a total sum of forty-six thousand three hundred and twenty-seven dollars and forty-three cents, (\$46,327.43), all of which said monies immediately upon receipt thereof, were deposited in said joint bank accounts.

XXXX.

It is true that for the period commencing with the date of the creation of said Trust No. 1052, under which Title Guarantee and Trust Company was trustee, and ending with the date of decedent's death, distributions in the names of Catherine B. Ferry and Peter L. Ferry were made from said trust in the total sum of seventy-three thousand one hundred ten dollars and seventy-eight cents (\$73,110.78), all of which monies were, upon receipt thereof, deposited to said joint bank accounts.

XXXXI.

It is true that for the period commencing with the date of the creation of said Trust No. 1080, under which the Title Guarantee and Trust Company was trustee, and ending with the date of decedent's death, distributions in the names of Catherine B. Ferry and Peter L. Ferry, as joint tenants, were made from said [79] trust in the total sum of two thousand two hundred eighteen dollars and thirty-eight cents (\$2,218.38), all of which said monies were, upon receipt thereof deposited to said joint bank accounts.

XXXXII.

It is true that one-half ($1/2$) of each and of all the premiums on each and all of said policies of insurance were paid for from funds belonging to said Catherine B.

Ferry, wife of said decedent, and it is true that one-half (1/2) of each and all of said policies of insurance upon the life of said decedent Peter L. Ferry, was taken out by Catherine B. Ferry, wife of said decedent.

XXXXIII.

It is true that all premiums paid on all of said policies of insurance were paid out of the funds deposited and commingled in the aforesaid joint bank accounts.

XXXXIV.

It is true that the Commissioner of Internal Revenue of the United States erroneously and unlawfully exacted from plaintiff a Federal Estate Tax on the estate of Peter Ferry, decedent, in that the Commissioner of Internal Revenue included in the gross estate of said decedent for Federal Estate Tax purposes more than one-half (1/2) of the value of all proceeds of all insurance upon the life of said decedent.

XXXXV.

It is true that on or about the 4th day of April, 1940, plaintiff filed a protest with the Commissioner of Internal Revenue bearing date of April 4, 1940, and that said protest was so filed at the invitation of said Commissioner of Internal Revenue for his consideration in rendering his final determination of any deficiency against the estate of said Peter L. Ferry, deceased. A true copy of said protest is attached to the plaintiff's amendment to Complaint for Refund of Federal Estate Taxes Illegally Collected. [80]

[Deleted at request of Plaintiff. J. F. T. O'Connor, Judge.]

XXXXVI.

It is true that said Commissioner of Internal Revenue in the rendition of his final determination as to the liability of said estate of Peter L. Ferry for Federal Estate Tax had before him and fully considered and acted upon each and all of the grounds, reasons, facts, errors assigned and other matters contained in said claim for refund and in said protest dated April 4, 1940.

XXXXVII.

It is true that each and all the grounds, reasons, facts and other matters set forth and contained in defendant's Pre-Trial Brief for Judge O'Connor on file herein were fully considered and acted upon by the Commissioner of Internal Revenue in the rendition of his determination of the liability of said Estate of Peter L. Ferry for Federal Estate Tax.

XXXXVIII.

It is true that the grounds of recovery upon which the decision in this matter by the within Court are based, and the grounds of recovery adduced at the trial of the issues in the within matter were each and all fully considered and acted upon by the Commissioner of Internal Revenue in the rendition of his final determination of the liability of said estate of Peter L. Ferry for Federal Estate Tax; and that the defendant and the Commissioner of Internal Revenue were not at any time or in any wise or manner deceived, misled, or imposed upon by the trial of and the decision upon each and all of said grounds relied upon by the plaintiff.

XXXXIX.

It is true that each and every allegation contained in Paragraphs I to XIII, both inclusive, of defendant's

amended answer and each and every allegation that is contained in defendant's answer to Amendment to Plaintiff's Complaint, and each and every allegation contained in defendant's answer to Second Amendment to Plaintiff's Complaint, which is in conflict with the facts [81] as hereinbefore set forth, are not true.

Conclusions of Law

And as conclusions of law from the foregoing facts, the Court finds:

I.

That Catherine B. Ferry took out one-half ($1/2$) of all insurance on the life of decedent, Peter Ferry, the entire value of the proceeds of which were included by the Commissioner of Internal Revenue in his final determination of the gross taxable estate of said decedent for Federal Estate Tax purposes.

II.

That at all times subsequent to the issuance of each and all of the policies of life insurance on the life of said decedent, plaintiff, Catherine B. Ferry, owned one-half ($1/2$) of said policies and at the time of death of said decedent, said Catherine B. Ferry owned one-half ($1/2$) of the proceeds of all of said insurance policies.

III.

That one-half ($1/2$) of the value of the proceeds of all the insurance policies upon the life of Peter Ferry, should not have been included in the gross estate of said decedent by the Commissioner of Internal Revenue, and should have been excluded from the gross estate of said decedent by the Commissioner of Internal Revenue in determining the taxable gross estate of said decedent for Federal Estate Tax purposes.

IV.

That one-half ($1/2$) of the value of all of the proceeds of all of the policies of life insurance upon the life of said decedent was not subject to Federal Estate Tax by reason of the death of said decedent, and was not includable in the value of [82] the gross estate of said decedent under subdivision (g) of Section 302 of the Revenue Act of 1926, as amended.

V.

That the inclusion by the Commissioner of Internal Revenue of the value of all the proceeds of the insurance policies taken out on the life of Peter L. Ferry, decedent, in the gross estate of Peter L. Ferry, decedent, in excess of one-half ($1/2$) thereof was improper.

VI.

That the assessment of a Federal Estate Tax upon more than one-half of the value of all the proceeds of all the insurance policies taken out on the life of Peter L. Ferry, was improper.

VII.

That the assessment of a Federal Estate Tax upon the value of that one-half ($1/2$) of the proceeds of all the insurance policies taken out on the life of Peter L. Ferry, deceased, which one-half ($1/2$) constituted the property of Catherine B. Ferry, was unlawful.

VIII.

That Catherine B. Ferry owned one-half ($1/2$) of all property transferred at any time to each and every trust included by the Commissioner of Internal Revenue in the gross estate of said decedent, and that the interest of said decedent and the interest of said Catherine B. Ferry in all of the property transferred at any time to each and

all of said trusts, was identical, and that one-half ($1/2$) of the value of the corpus of each and every trust was not includable in the gross estate of said decedent and that one-half ($1/2$) of the value of the corpus of each and every trust was not subject to Federal Estate Tax by reason of the death of said decedent, and was not includable in the value of the gross estate of said decedent. [83]

IX.

That one-half ($1/2$) of the entire interest in each and all of said trusts, the entirety of which was finally included in the value of the gross estate of said decedent by said Commissioner of Internal Revenue, was never at any time transferred in any manner by the decedent subject to or within the purview of Subdivision (c) or any or all other subdivisions of Section 302 of the Revenue Act of 1926, as amended.

X.

That the Commissioner of Internal Revenue should not have included more than one-half ($1/2$) of the value of the corpus of each and every trust in the gross estate of Peter L. Ferry, decedent, and should have excluded one-half ($1/2$) of the value of the corpus of all of said trusts from the gross estate of said decedent.

XI.

That decedent at the time of his death had no interest in Trust No. 1080, and that no part of the value thereof was includable in the gross estate of said decedent, and no part thereof includable in the gross estate of said decedent under Subdivision (c) or Subdivision (e) or any other subdivision of Section 302 of the Revenue Act of 1926, as amended.

XII.

That no part of the value of said Trust No. 1080 should have been included by the Commissioner of Internal Revenue in the gross estate of said decedent and no part thereof is subject to Federal Estate Tax.

XIII.

That decedent did not at any time transfer a 1/20th interest or any other interest in Trust No. 1080 in contemplation of death, and decedent at no time made any transfer of any property whatsoever of any nature in contemplation of death, or within the purview of Subdivision (c) or any other subdivision of Section 302 [84] of the Revenue Act of 1926, as amended.

XIV.

That the Commissioner of Internal Revenue erroneously assessed and erroneously collected Federal Estate Taxes from plaintiff in the sum of sixty-three thousand eight hundred twenty-five dollars and seventy-seven cents (\$63,825.77), plus interest paid thereon in the amount of four thousand one hundred sixty-four dollars and twenty-three cents (\$4,164.23).

XV.

That plaintiff is entitled to judgment ordering and decreeing that plaintiff do have and recover of and from the defendant the amounts sought for in her complaint hereunder, as follows:

- a. The sum of sixty-three thousand, eight hundred twenty-five dollars and seventy-seven cents (\$63,825.77),
- b. Together with interest at the rate of 6% per annum from June 16, 1936 to November 29, 1938 on the sum of two hundred forty dollars and seventy-

two cents (\$240.72) and interest at the rate of 6% per annum from June 16, 1936 to November 29, 1938 on the sum of two thousand nine hundred two dollars and thirteen cents (\$2,902.13) and interest at the rate of 6% per annum from June 16, 1936 to July 27, 1937 on the sum of thirty thousand forty-nine dollars and eleven cents (\$30,049.11) and interest at the rate of 6% per annum from June 16, 1936 to July 27, 1937 on the sum of three thousand six hundred twenty-five dollars and eighty-nine cents (\$3,625.89), and interest at the rate of 6% per annum from June 16, 1936 to June 12, 1937 on the sum of eight thousand dollars (\$8,000.00), and interest at the rate of 6% per annum from June 16, 1936 to April 30, 1937 on the sum of fifteen thousand dollars (\$15,000.00), and interest at the rate of 6% per annum [85] from June 16, 1936 to April 8, 1937 on the sum of four thousand seven dollars and ninety-two cents (\$4,007.92) being the total sum of \$4,164.23, and

- c. Together with interest at the rate of 6% per annum on the sum of two hundred forty dollars and seventy-two cents (\$240.72), from November 29, 1938 to date of judgment herein, and with interest at the rate of 6% per annum on the sum of two thousand nine hundred two dollars and thirteen cents (\$2,902.13) from November 29, 1938 to date of judgment herein, and with interest at the rate of 6% per annum on the sum of thirty thousand forty-nine dollars and eleven cents (\$30,049.11) from July 27, 1937 to date of judgment herein, and with interest at the rate of 6% per annum on the sum of three thousand six hundred twenty-five dollars and eighty-nine cents (\$3,625.89) from July

27, 1937 to date of judgment herein, and with interest at the rate of 6% per annum on the sum of eight thousand dollars (\$8,000.00) from June 12, 1937 to date of judgment herein, and with interest at the rate of 6% per annum on the sum of fifteen thousand dollars (\$15,000.00) from April 30, 1937 to date of judgment herein, and with interest at the rate of 6% per annum on the sum of four thousand seven dollars and ninety-two cents (\$4,007.92) from April 8, 1937 to date of judgment herein,

d. And for her costs of suit herein,

e. ~~And for attorney fees in the sum of \$10.00.~~

[Deleted at request of Plaintiff. J. F. T. O'Connor, Judge.]

Judgment is hereby ordered to be entered accordingly
April
dated this 19 day of ~~February~~, 1944.

J. F. T. O'CONNOR
Judge of the Above Entitled Court [86]

Approved as to Form, this day of February
1944.

CHAS. H. CARR

United States Attorney

E. H. MITCHELL

Asst. United States Attorney

Received copy of the within this 25th day of Feb., 1944.
Chas. H. Carr, U. S. Atty; E. H. Mitchell, Asst. Atty.,
Attorneys for Def.

[Endorsed]: Filed Apr. 19, 1944. [88]

In the District Court of the United States in and for the
Southern District of California
Central Division

No. 2106 O'C

CATHERINE B. FERRY, as Executrix of the Last
Will and Testament of PETER FERRY, Deceased,
Plaintiff,

vs.

ETHEL STRICKLAND ROGAN, as Executrix of the
Estate of NAT ROGAN, Collector of Internal Revenue
for the Sixth District of California, Deceased,
Defendant.

JUDGMENT

The above entitled cause having come on regularly to be heard the 1st day of June, 1943, before the Honorable J. F. T. O'Connor, Judge presiding, sitting without a jury, a jury having been expressly waived, plaintiff appearing by her attorneys, Messrs. Claude I. Parker, Ralph W. Smith and J. Everett Blum, by John Moore Robinson, defendant appearing by his attorney, E. H. Mitchell, Esq., and the matter having been heard upon the issues raised by the complaint and amendments thereto, and the answers thereto, and evidence both oral and documentary having been introduced and the cause having been submitted to the Court for decision, and the Court having made its findings of fact and conclusions of law, after due deliberation,

Now, Therefore, It Is Hereby Ordered, Adjudged, and Decreed [89] that plaintiff have judgment against defendant in the sum of

- a. \$63,825.77,
- b. Together with interest at the rate of 6% per annum from June 16, 1936 to November 29, 1938 on the sum of \$240.72, and interest at the rate of 6% per annum from June 16, 1936 to November 29, 1938 on the sum of \$2,902.13, and interest at the rate of 6% per annum from June 16, 1936 to July 27, 1937 on the sum of \$30,049.11, and interest at the rate of 6% per annum from June 16, 1936 to July 27, 1937 on the sum of \$3,625.89, and interest at the rate of 6% per annum from June 16, 1936 to June 12, 1937 on the sum of \$8,000.00, and interest at the rate of 6% per annum from June 16, 1936 to April 30, 1937 on the sum of \$15,000.00, and interest at the rate of 6% per annum from June 16, 1936 to April 8, 1937 on the sum of \$4,007.92, being the total sum of \$4,164.23, and
- c. Together with interest at the rate of 6% per annum on the sum of \$240.72 from November 29, 1938 to date of this judgment, and with interest at the rate of 6% per annum on the sum of \$2,902.13 from November 29, 1938 to date of this judgment, and with interest at the rate of 6% per annum on the sum of \$30,049.11 from July 27, 1937 to date of this judgment, and with interest at the rate of 6% per annum on the sum of \$3,625.89 from July 27, 1937 to date of this judgment, and with interest at the rate of 6% per annum on the sum of \$8,000.00 from June 12, 1937 to date of this judgment, and with interest at the rate of 6% per annum on the sum of

\$15,000.00 from April 30, 1937 to date of this judgment, and with interest at the rate of 6% per annum on the sum of \$4,007.92 from April 8, [90] 1937 to date of this judgment,

d. And for her costs of suit herein in the sum of \$.

e. ~~And for attorney fees in the sum of \$10.00.~~

[Deleted at Plaintiff's request.]

Judgment is hereby ordered to be entered accordingly

April

dated this 19 day of ~~February~~, 1944.

J. F. T. O'CONNOR

Judge of the Above Entitled Court

Approved as to Form, this day of February, 1944.

.....
CHAS. H. CARR

United States Attorney

.....
E. H. MITCHELL

Asst. United States Attorney

Received copy of the within this 25th day of Feb., 1944. Chas. H. Carr, U. S. Atty.; E. H. Mitchell, Asst. U. S. Attorney, *Attorney* for Def.

[Endorsed]: Judgment entered Apr. 19, 1944. Docketed Apr. 19, 1944. Book C. O. 24, Page 791. Edmund L. Smith, Clerk; by Francis E. Cross, Deputy.

[Endorsed]: Filed Apr. 19, 1944. [92]

[Title of District Court and Cause.]

NOTICE OF APPEAL

To: Catherine B. Ferry, Plaintiff, and Claude I. Parker,
Ralph W. Smith and John Moore Robinson, Her
Attorneys:

Notice Is Hereby Given that Ethel Strickland Rogan,
as Executrix of the Estate of Nat Rogan, Collector of
Internal Revenue for the Sixth District of California, de-
ceased, the defendant above named, hereby appeals to the
Circuit Court of Appeals for the Ninth Circuit from the
final judgment entered in this action on the 19th day of
April, 1944.

Dated: July 18, 1944.

CHARLES H. CARR,
United States Attorney

E. H. MITCHELL,
Ass't. U. S. Attorney

By E. H. Mitchell

Attorneys for Defendant-Appellant

[Endorsed]: Filed & mailed copy to Claude I. Parker
& Ralph W. Smith; & John Moore Robinson—Attys. for
Plaintiff Jul. 18, 1944. [93]

[Title of District Court and Cause.]

ORDER EXTENDING TIME TO DOCKET CAUSE
ON APPEAL

Upon motion of defendant-appellant, and good cause appearing therefor:

It Is Hereby Ordered that the time within which to file the record and docket the above-entitled cause in the United States Circuit Court of Appeals for the Ninth Circuit be, and the same hereby is, extended to and including the 16th day of October, 1944.

Dated this 14th day of August, 1944.

PAUL J. McCORMICK
United States District Judge

[Endorsed]: Filed Aug. 14, 1944. [94]

[Title of District Court and Cause.]

STIPULATION AND ORDER REGARDING
RECORD ON APPEAL

Whereas, the defendant in above-entitled action has taken an appeal from the judgment in above-entitled case to the United States Circuit Court of Appeals for the Ninth Circuit, and the record therein consists of eighty-four written exhibits, some thereof consisting of as many as thirty pages of printed and written matter; and

Whereas, it is the desire of the parties hereto, in order to save the time, labor, and expense of making photostatic copies of all thereof, to facilitate printing and to permit inspection by the Appellate Court of the originals, that

certain of said original exhibits be sent to said Court in lieu of copies;

Now, Therefore, It Is Stipulated and Agreed by and between the parties, through their respective counsel undersigned, that the originals of Plaintiff's Exhibits numbered 8, 9, 10, 11, 12, 37, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, [102] 58, and 45, and Defendant's Exhibit E be sent with the record to the Appellate Court in lieu of copies; and that this stipulation and order shall be added to the record on appeal. [E.H.M.—R.W.L., Dec. 4, 1944.]

Dated, December 4th, 1944.

CHARLES H. CARR

United States Attorney

E. H. MITCHELL

Assistant United States Attorney

By E. H. Mitchell

Attorneys for Defendant-Appellant

CLAUDE I. PARKER and

RALPH W. SMITH

By Ralph W. Smith

Attorneys for Plaintiff-Appellee

It Is So Ordered this 5th day of December, 1944.

J. F. T. O'CONNOR

Judge of the District Court

[Endorsed]: Filed Dec. 5, 1944. [103]

[Title of District Court and Cause.]

CLERK'S CERTIFICATE

I, Edmund L. Smith, Clerk of the District Court of the United States for the Southern District of California, do hereby certify the foregoing volume consisting of 103 pages, numbered from one to 103 inclusive, contains a full, true and correct copy of Complaint for Refund of Federal Estate Taxes Illegally Collected; Amended Answer; Amendment to Complaint for Refund of Federal Estate Taxes Illegally Collected; Answer to Amendment to Plaintiff's Complaint; Second Amendment to Complaint for Refund of Federal Estate Taxes Illegally Collected; Answer to Second Amendment to Plaintiff's Complaint; Memorandum Opinion; Minute Order dated January 31, 1944; Defendant's Objections to Form of Proposed Findings and Conclusions (Local Rule 7 (a)); Certificate of Probable Cause; Findings of Fact and Conclusions of Law; Judgment; Notice of Appeal; Order of District Court Extending Time to Docket Cause on Appeal; Stipulation and Order of Circuit Court Extending Time to Docket Cause on Appeal; Defendant's Designation of Contents of Record on Appeal; and Stipulation and Order Regarding Record on Appeal, which together with Reporter's Transcript (7 volumes), Certified Copies of Plaintiff's Exhibits 1, 2, 3, 4, 5, 6, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26-A, 26-B, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 38, 39, 40, 41, 42, 43, 44, 46, 47, 59, 61, 62, 63, 64 and 65, Certified Copies of Defendant's Exhibits A, B, C, D, F, G, H, I, J, K, L, M, N, O, P, Q, R, S, T and U, and original exhibits, being Plaintiff's

Exhibits 8, 9, 10, 11, 12, 37, 45, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57 and 58, and Defendant's Exhibit E, transmitted herewith, constitute the record on Appeal to the United States Circuit Court of Appeals for the Ninth Circuit;

In testimony whereof, I have hereunto set my hand and affixed the seal of the District Court for the Southern District of California, this 11th day of December, in the year of our Lord one thousand nine hundred and forty-four and of the Independence of the United States the one hundred and sixty-ninth.

[Seal]

EDMUND L. SMITH,

Clerk of the District Court of the United States for the
Southern District of California,

By R. B. Clifton,

Deputy Clerk.

[Title of District Court and Cause.]

Before the Honorable J. T. T. O'Connor

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Los Angeles, California June 1, 1943

Appearances:

For the Plaintiff: John Moore Robinson, Esq.,

For the Defendant: E. H. Mitchell, Assistant
United States Attorney.

(Case called for trial and announced ready.)

The Court: Proceed, gentlemen.

Mr. Robinson: In the Ferry matter does the Court desire an opening statement?

The Court: Yes, sir.

Mr. Robinson: This matter, a Federal Estate Tax matter, involves taxability of certain trusts in which the decedent was one of the trustors, likewise involves the taxability of certain insurance upon the life of the decedent.

Plaintiff intends to show the Commissioner erred in failing to exclude the contribution of the wife, plaintiff in this matter, to the trust and to the policies of insurance.

The third matter involved is the taxability of a certain trust known as Trust No. 1080 which was held by the decedent and his wife prior to his death in joint tenancy. Approximately 10 days prior to the death of the decedent, the decedent transferred his one-half interest in the trust which was held in joint tenancy thereby destroying, according to plaintiff's contention, the joint tenancy. Upon

plaintiff's theory none of the said Trust 1080 is includable in gross estate and should be excluded.

Plaintiff intends to show in this matter that at the [1-A*] time the decedent and his wife were married or shortly prior thereto that an oral property settlement agreement was entered into, an agreement as to how the income and thereafter-acquired property should be owned.

We intend to show that one-half of the property was owned at all times from the time of acquisition to and including the date of the decedent's death by the widow and one-half by the decedent. In the event that the Court should feel that this burden has not been met by taxpayer, however, that we fail to show that those are the facts, we feel that all separate property in the form of contribution to this insurance and to these trusts should be excluded from the gross estate; that it is all separate property of the widow; and likewise all of her one-half interest in vested community property. and likewise her one-half interest in income from community property acquired prior to July 29, 1927.

Mr. Mitchell: If the Court please, I would like in order to clarify the issues to refer, first, to the claim for refund which is attached as Exhibit E to the stipulation relative to facts, which I assume will be offered into evidence, in order to call the Court's attention to the fact as to what the issues were in the refund claim upon which this suit, of course, is based. [2]

* * * * *

Then they go on to the other ground for recovery. The claim, of course, is so far as the trusts are concerned that only 50 per cent of the value of the corpus is in-

*Page number appearing at top of Reporter's Transcript.

cludable in the estate, instead of 100 per cent; and the ground for that claim is that there was a property settlement agreement effected by the conduct of the parties in creating the trusts. [4]

* * * * *

I think I should say this at the outset of the trial: A suit for refund can only be brought in the Federal Court or in the Court of Claims after a claim for refund has been presented, considered, and rejected by the Commissioner of Internal Revenue. The regulation in effect at the time [5] applicable here, Article 99, reads, or read, as follows—reading from Regulations 80, 1937 edition, Article 99:

* * * * *

That regulation has been approved and followed by the Courts. The general rule is that in a suit for refund a suitor can rely for a recovery only upon grounds previously presented to or considered by the Commissioner. [6]

* * * * *

In other words, the purpose of this condition precedent to the jurisdiction of this Court to entertain such a suit is to avoid a multiplicity of suits and attempt, as far as possible, to settle them administratively by refund claims. Therefore, the rule is that a suit cannot be brought in the District Court or a Court of Claims except upon grounds as stated in the claim and the facts, essential facts, presented to the Commissioner. And it was stressed on essentially the same facts as well as the same grounds.

The Ninth Circuit recently said—last April 13th—in *Goodrich Co. v. United States*: “The claim for refund must be the identical claim upon which the suit is based.”

Your Honor's attention is called now again to the refund claim which is the basis of this suit.

So far as the trusts are concerned the only evidence admissible will be conduct establishing a property settlement agreement between the spouses as of the date of the creation of the trusts. The only evidence admissible under the insurance claim will be evidence tending to prove that the premiums were paid with community property of the new type, not separate property of the wife, but community [7] property of the new type.

Counsel undoubtedly, I anticipate, will endeavor to introduce evidence which does not support those claims. There is an exception to that rule. That is where the Commissioner actually considers other facts and other grounds in support of the claim at issue—and this is the estate tax claim to which I now refer—and until it is shown that the Commissioner actually did consider any other grounds or any facts not stated in the claim for refund, we will object to any evidence upon such facts or such grounds.

The stipulation of facts—I don't know whether it has been introduced or not; it has been filed, as I understand it—but it does contain some evidence that does not support the claim for refund—evidence to the effect that certain joint tenancy deeds were transferred to trustees in one of these trusts, Trust No. 6204. If the plaintiff does not establish that those facts and that ground were considered in support of the claim for refund, we will move to strike those portions of the stipulation of facts beginning at line 2, page 18, and ending line 9, page 25. If that is not yet in evidence, we will object to the introduction of that portion of the stipulation of facts on the ground that it is not supported by the refund claim.

The Court: The stipulation of facts is not in evidence yet. It was filed. [8]

* * * * *

The Court: It was filed on April 12, 1943. Call your first witness. Do you want to reply?

Mr. Robinson: If I may.

The Court: Yes.

Mr. Robinson: I would like to call the Court's attention to the letter of rejection to the claim for refund dated October 18, 1940.

The Court: At what page is that?

Mr. Robinson: That is starting on page 46. The Court's attention is particularly directed to page 47 of the claim. First, commencing on line 10 of page 47, the following language appears in the Government's letter:

"It appears that the corpus of all six of the trusts was acquired by the decedent during coverture prior to the enactment of Section 161(a) of the California Civil Code giving the wife a vested interest in the community. Prior to the enactment of this section of the Code, the wife had a mere expectancy in the community. The rights of the husband were so complete that the husband was the owner of the community. U. S. v. Robbins, 269 U. S. 315. The fact that the wife became a co-trustor is therefore without significance or effect. She contributed nothing of her own, and her participation was a mere formality."

You will note, if the Court please, that the Government has gone into the matter very thoroughly as to whether she [9] contributed anything to these trusts as being the test, and that is the test that we desire to make. They go on further and say:

"It is contended that the legal effect of these trusts was to constitute the wife a tenant in common with her hus-

band in the corpus thereof. There is nothing to indicate that the wife acquired any additional property"—note that, "any additional property"—"or property rights by becoming a signatory to the trust instruments. It may be assumed, without conceding that upon revocation of any of the trusts the corpus by the terms of the instruments would have become the property of the trustors, in which event the tenancy in common might have been created."

The Court's further attention is directed to Exhibit F attached to the "Amendment to Complaint for Refund of Federal Estate Taxes Illegally Collected." This protest was filed with the understanding and intention on the part of the taxpayer that it would be an amendment or addition to the claim for refund and should be construed as a part thereof. A close examination of the protest will indicate that throughout the entire protest it was the intention of taxpayer to bring attention of the Government—and the taxpayer feels that it has—to the effect that contributions were made to these trusts and to these insurance policies. Reading the protest with the letter of rejection, it appears clear that the issue of contribution to the trusts [10] and to the insurance policies was definitely in issue before the Government. [11]

* * * * *

Mr. Robinson: At this time the taxpayer offers into evidence the stipulation which has been signed by counsel for plaintiff and defendant in this matter.

The Court: The stipulation that was filed April 12, 1943?

Mr. Robinson: That is right. [12]

Mr. Mitchell: Defendant will object only to that portion of the stipulation of facts beginning at the top of page 18, line 2, and ending on line 9, page 25.

As the question has actually come up for a ruling—I did not think it would come up so soon—I would like to read some authorities to your Honor, because I think this point is so very, very important.

Mertens on the Law of Federal Income Taxation,

The Court: Mr. Mitchell, may I read this first, and then I will know a little more intelligently what it refers to?

Mr. Mitchell: Yes, your Honor. I might state briefly that those particular lines refer to the acquisition by Mr. and Mrs. Ferry of pieces of real estate wherein the deeds were to them as joint tenants with the right of survivorship. The facts themselves are not disputed, only the admissibility on the grounds. I think that covers the whole thing. It is just a repetition of a number of deeds, and they are all to the spouses as joint tenants.

The Court: All of these transfers seem to be to the decedent and his wife as joint tenants.

Mr. Mitchell: That is correct.

Mr. Robinson: All, with the exception of three, your Honor, and they were to husband and wife alone, which would make them tenants in common. [13]

The Court: Which three were those?

Mr. Robinson: I believe one is No. 14. Just a second, your Honor. No. 14, No. 30 and No. 32.

* * * * *

The Court: The parcels do not run consecutively I notice. There are some omissions like Parcel 12 and Parcel 22 which are not included consecutively. I suppose they are in some other.

Mr. Robinson: I believe the reason for that, those properties stood in the name of Peter L. Ferry at the time

they were transferred to the trust. Is that right, Mr. Mitchell?

Mr. Mitchell: I think that is a fact.

* * * * *

Mr. Mitchell: I think I have; yes. Do you want this [14] filed as one of your exhibits, the estate tax return?

Mr. Robinson: That is all right.

* * * * *

The Clerk: The stipulation relative to facts will be Plaintiff's Exhibit 1 for identification, and these photo-static copies of estate tax returns will be Plaintiff's Exhibit 2 for identification.

(The documents referred to were marked as Plaintiff's Exhibits Nos. 1 and 2, for identification.)

[Note: Plaintiff's Exhibits Nos. 1 and 2 will be found in the Book of Exhibits at pages 457 and 562.]

Mr. Mitchell: I have already called your Honor's attention to the refund claim and the grounds and the facts relied upon in support of the claim. I have called your Honor's attention to the letter of rejection which disallows [15] the claims as stated in the refund claim. And, to show the consistency of the taxpayer throughout, I desire now to call your Honor's attention to a portion of the estate tax return, Schedule C-2, pages A-11 through A-15, and relating to the insurance policies. [16]

* * * * *

"The decedent furthermore desired to and did by the creation of these trusts enter into a property settlement with his wife and widow, Catherine B. Ferry, to protect her * * * " [18]

* * * * *

In other words, the reliance is solely on the community property law of California and the claim is so based.

The first case I desire to call your Honor's attention to is a case decided by the Ninth Circuit on April 13, 1943, less than two months ago. This was a case wherein the insufficiency of the refund claim was objected to by the Government, the objection being— [19]

* * * * *

That is a sample of the extent to which the Courts are now going in insisting that the claim be identical and that the facts recited in the claim are the only facts that are permissible in support of the claim, and the grounds alleged in the complaint are the only grounds permissible to the suit.

Merten's Law of Federal Income Taxation, published in 1943, Section 58.44, pages 343-344, reads in part as follows: [23]

* * * * *

Comparing that with the case at hand, there was nothing in the refund claim or in the estate tax return to apprise the Commissioner that when the suit was filed three or four years later the plaintiff would claim that, instead of a property settlement agreement ground in support of its claim in the Trusts, it now relies upon the joint tenancy ground, the fact that she was a separate owner of property [25] as a joint tenant with her husband.

So far as the insurance is concerned, in the refund claim and in the estate tax return the taxpayer relies and bases its claim as far as the insurance is concerned upon the fact that the premiums were paid with community

funds of the new type acquired since 1927. Of course, we have not come to that point. This objection only goes to the question of the trusts, and so far as the first ground which this particular portion of the stipulation of facts purports to support, that is the ground, that there were joint tenancies created prior to the creation of the trusts and then the spouses transferred the joint tenancy property into the trust.

There is no evidence to even suggest to the Commissioner on the refund claim or in the estate tax return, up to the present time at least, that it is a joint tenancy deed or that the spouses own the property in joint tenancy instead of as community, old type community existed. And how could the Commissioner investigate that question and check it, where the contention was not made at all? [26]

* * * * *

And we say here that, from the refund claim, the Commissioner was not required to search the records of Los Angeles County, a two or three weeks or months job, to determine whether they were joint tenants, when they merely represented themselves to be tenants in common and title in the husband or the wife. I say it would still be community property no matter whose name it stood in according to the record. "since the Commissioner undertook to determine this issue he was required to determine it correctly, * * *" [27]

* * * * *

Another case. decided by the Fifth Circuit in 1932, *Snead v. Elmore*, 59 Fed. (2d) 312, reading from page 314:

"* * * Regulations then in force, No. 45, Art. 1036, [29] require that, 'All the facts relied upon in support of the claim shall be clearly set forth under oath.' "

That is the same regulation and the same language which we have applicable here. Proceeding with the opinion: "The purpose is to enable the claimed errors to be corrected by the Commissioner and suits to be minimized, and if disagreement persists to limit the litigation to the matters which have been so-examined (by the Commissioner, of course) and in reference to which the tax officers are fully prepared to defend the issue. They may decline to waive and may insist on a proper claim for refund as a prerequisite to suit. (Citing two Supreme Court cases.) This does not mean that the claim for refund must have contained all the evidence or argument that is offered in the suit, but it must have indicated not only the amount claimed but the substantial grounds on which illegality is asserted and the general facts supporting the grounds, so that they may be fully investigated."

In our case, if the Court please, we have a claim that 50 per cent of the value of the trust rather than 100 per cent should be included. [30]

* * * * *

Then, another case, decided by the 1st Circuit in 1931, is *J. P. Stevens Engraving Co. v. United States*, 53 Fed. (2d) 1, reading from page 2:

"* * * All facts relied upon in support of the claim should be clearly set forth in detail under oath."

That is quoting the same regulation. At page 3 we find this language:

"Appellant's claim for refund did not challenge the validity of the additional tax in question on any ground other than the first above stated one. That ground of attack has been abandoned."

I don't know whether the plaintiffs in this case have abandoned the—no; I believe not. In his opening statement counsel stated that he still relies upon the contention that there was a property settlement agreement, and our objection does not go to any evidence in support of that, of course. [32]

“That ground of attack has been abandoned. The claim for refund contained no hint of the existence of the grounds of attack now relied on. The statute shows that the United States did not consent to the maintenance against it of such a suit as the instant one, unless the plaintiff, before instituting the suit, had, by a duly filed claim for refund, afforded to the Commissioner of Internal Revenue an opportunity to determine whether the state of facts relied on by the plaintiff did or did not exist, * * *.”

I think that covers the argument on that point and the positions that I wanted to call to your Honor's attention. That only goes to the portion of the refund claim—rather, the portions of the stipulation of facts, beginning at line 2, page 18 and ending with line 9, page 25, all relating to the acquisition of real estate by joint tenancies.

The Court: There are also three tenancy in common parcels, 14, 30 and 32, and you apply the same argument to that?

Mr. Mitchell: The same would apply to that, of course.

* * * * *

Mr. Robinson: In this matter taxpayer filed a claim for refund. That claim for refund is a claim for the refund of some \$63,000. The grounds upon which that claim for refund is based are (1) the includability of the trusts—

The Court: The what?

Mr. Robinson: The includability. [33]

The Court: Whether or not the 100 per cent—

Mr. Robinson: Of the trusts are includable, or whether one-half is includable.

The Court: Of the trusts that were made by the husband and wife?

Mr. Robinson: That is right. The next ground is whether 100 per cent or what portion of the insurance premiums are includable.

The Court: You claim they are 50 per cent?

Mr. Robinson: We claim they are 50 per cent.

And lastly, whether as to Trust 1080 which had been held in joint tenancy by decedent and his wife until a short time prior to his death, when decedent transferred his one-half interest, whether any of that is subject to tax.

Those are the three grounds. The regulation provides that the taxpayer shall file a claim for refund setting forth the amount. That has been done. And setting forth the grounds upon which the taxpayer relies. Those three grounds are set forth. Then the cases go on further and provide the taxpayer shall set forth the general facts. The Court's attention is called to the use of that word "general." Nothing specific is intended by it, simply any facts, generally upon the subject, which will support the grounds. In other words, we have not varied from our grounds, and we intend to rely upon those same three grounds.

Then we have the further language in the claim for [34] refund showing that as facts behind those grounds we have not relied solely upon a property settlement agreement. If we had we would not have put the language in the claim referring to Mrs. Ferry's property on

page 43 of the stipulation, reading from Exhibit E of the claim for refund.

* * * * *

Mr. Robinson: Commencing on line 2 and ending on line 5.

* * * * *

Mr. Robinson: The following language was used:

"That respecting the inclusion in the gross estate of certain trusts as transfers, claimant states that prior to the death of the decedent the decedent and his wife made certain transfers of their property in trust; * * *."

By "their property" that can refer to community property, her separate property, their joint interests, or his separate property.

* * * * *

Mr. Robinson: Those are the facts supporting the [35] grounds.

Likewise, on page 44, in lines 3 and 4, the same language is used, as follows:

"That it cannot be doubted that in the instant matter the decedent and his wife by their conduct in placing their property in trust effected a property settlement agreement * * *." There is the further point. [36]

* * * * *

Mr. Robinson: Then we have the further document which is controlling of all, because it shows that the Government was not misled in this matter; that they had the full facts before them, showing that contention of the taxpayer that Mrs. Ferry had made contributions. That is commencing on page 47 of the stipulation, being the letter of rejection of this claim for refund. On page 47, com-

mencing on line 18, in reference to these six trusts the Commissioner uses this language, this very broad language, referring to Mrs. Ferry and her contribution to the trusts: "She contributed nothing of her own and her participation was a mere formality." [37]

* * * * *

Mr. Robinson: By making a statement of that nature, that comprises investigation on the part of the Commissioner that they have gone into all of her property and they found and made an issue of the fact that she contributed nothing and that—

* * * * *

Mr. Robinson: Reference on the same matter is made to [38] the protest that is attached to the plaintiff's amended complaint, on the theory that that protest is an amendment to the claim for refund.

* * * * *

Mr. Robinson: Do you have copy of the protest dated October 29, 1937? [39]

* * * * *

Mr. Robinson: There is no question but what a claim for refund, prior to the running of the statute of limitations, can be amended. Likewise is this true: Where the Commissioner—

The Court: Wait a minute, now. You do not mean to say that it can't be amended prior?

Mr. Robinson: Can be amended.

The Court: Yes, certainly.

Mr. Robinson: Likewise is this true to a greater extent: When the Commissioner has acted upon the claim for refund and the amendment thereto.

This protest attached to the amended complaint contains an additional ground, to-wit, whether or not certain deductions could be deducted, and should be deducted from [40] the gross estate. This ground was not set forth in plaintiff's original claim for refund. However, the Commissioner acted upon this entire protest, treating same as an amendment thereto, and allowed that deduction.

* * * * *

The Court: I am assuming that Exhibit 1, which has been marked for identification, and offered by the plaintiff in evidence, is in evidence with the exception of the objection that we are arguing now by counsel for the Government.

Mr. Mitchell: Yes. There is no objection to any of the rest of it. [41]

* * * * *

Mr. Robinson: In the stipulation, if the Court would desire to take the time and examine the figures, it will be found from an examination of the figures and the various determinations and rulings by the Commissioner that this deduction matter was allowed to the taxpayer.

The Court: If it was allowed, he must have considered it. [42]

* * * * *

The Court: It is your contention that the protest is a part of the claim under the statute?

Mr. Robinson: That is right, for the reason that the protest filed prior to the denial of the claim for refund was acted upon by the Commissioner, in view of the fact that the Commissioner allowed the item claimed as deductions therein, which item was not contained in the claim for refund.

The Court: The protest, then, contained a new claim for deduction?

Mr. Robinson: That is right; set forth a new and additional ground, which ground was acted upon by the [45] Commissioner and allowed. [46]

* * * * *

The Court: Motion will be denied and exception allowed the Government. Proceed.

Mr. Robinson: Mr. Martell.

CHARLES S. MARTELL,

called as a witness by and on behalf of the Plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: Your full name?

The Witness: Charles S. Martell.

Direct Examination

By Mr. Robinson:

Q. What is your name? A. Charles S. Martell.

Q. What is your occupation? [50]

A. Trust auditor, the Title Insurance and Trust Company.

Q. Are you familiar with Trust No. 1052 of the Title Guarantee and Trust Company? A. Yes.

Q. I ask you if you brought with you, pursuant to subpoena, a letter in the possession of that trust under date of November 16, 1934, executed by Catherine B. Ferry and Peter L. Ferry. A. Yes; I have.

Mr. Robinson: Have you seen that, counsel?

Mr. Mitchell: Trust agreement? Oh, may I refresh my memory? Oh, yes, I remember it.

(Testimony of Charles S. Martell)

Q. By Mr. Robinson: I will ask you, Mr. Martell, if you recognize the signatures thereon.

Mr. Mitchell: I will stipulate that they are the signatures of the Ferrys.

The Court: Accept the stipulation, counsel?

Mr. Robinson: I will accept the stipulation.

The Court: All right, proceed.

Mr. Robinson: I offer this letter dated November 16, 1934, either by Catherine B. Ferry or Peter L. Ferry, into evidence.

Mr. Mitchell: Defendant objects on the ground, first, that it is a self-serving declaration; and second, that it is not supported by the refund claim. This latter ground [51] of objection is the same kind which I have heretofore made in objecting to the introduction of portions of the stipulation of facts. I could state my objections better if I knew exactly the purpose of the offer.

Mr. Robinson: I might state the purpose of the offer. There were payable from Trust No. 1052, Title Guarantee and Trust Company, the entire income thereof to Mr. and Mrs. Ferry.

Mr. Mitchell: During their lifetimes?

Mr. Robinson: During their lifetimes. We intend to show that that income, although the checks were made payable to Mr. Ferry, was in fact one-half Mrs. Ferry's income and that those income moneys were used to purchase and pay some of the premiums on some of the insurance policies involved in this matter.

Mr. Mitchell: I think I understand now the purpose. We object to it further and move that it be stricken, unless it is shown that the income was community income as stated in the claim for refund, and unless plaintiff is able to trace the payments from this trust to the actual

(Testimony of Charles S. Martell)

payment of insurance premiums. That is, of course, the main purpose, to start a chain and follow these payments through their various transmutations, perhaps, into a bank and from bank, by check, to the insurance companies; and it is a self-serving declaration and it is objected to on the first ground. And, may I just read a moment from Jones Commentaries [52] on Evidence, 2nd Edition, Volume 2, page 1636?

Mind you, it is an attempt to establish that funds—it is an attempt to establish that funds were used to pay premiums and that the wife was community half-owner of those funds. The text writer here says—Jones Commentaries: [53]

* * * * *

I think I will add another ground to my objection, and that is that it is immaterial.

Mr. Robinson: May I call the Court's attention to the fact that this particular part—

The Court: Wait a minute until I read it.

This instrument that is handed to me—has this been marked, Mr. Cross, for identification?

The Clerk: No, your Honor. That will be Plaintiff's [55] Exhibit 3 for identification.

(The document referred to was marked as Plaintiff's Exhibit No. 3, for identification.)

[Note: Plaintiff's Exhibit No. 3 will be found in the Book of Exhibits at page 623.]

* * * * *

Mr. Robinson: Are you objecting on the ground that this is a photostatic copy of the original?

(Testimony of Charles S. Martell)

Mr. Mitchell: Oh, no, no. The trust indenture is the best evidence after that which the Court just read from the letter.

The Court: In other words, the trust agreement itself will clarify all of this. It seems to me that what this Exhibit 3 for identification does is clarify the position that the trust company had from the inception of the trust, which was in 1925—and this letter is dated nine years later—was to relieve the trust company from any suit on the part of Catherine B. Ferry because they had not paid to her her one-half of the income from that trust; and also, not [56] only ratifying the payments, but instructing the trust company to continue to pay, which she had a right to authorize them, to pay her amounts, if they were her amounts, to anyone she pleased. So, on that ground, the objection will be sustained.

* * * * *

Mr. Robinson: Plaintiff excepts.

The Court: Yes.

Q. By Mr. Robinson: Calling your attention, Mr. Martell, to Trust No. 1052, have you brought with you the records of the Trust Company?

A. Yes; I have.

Q. Those are the original records of the company?

A. Yes.

Mr. Robinson: You are not offering any objection to the sufficiency of the records, are you, Mr. Mitchell?

Mr. Mitchell: Oh, no. If Mr. Martell says those are the original records, that is enough.

(Testimony of Charles S. Martell)

Q. By Mr. Robinson: Can you inform us of the amount of income on hand available for distribution on June 16, 1935?

Mr. Mitchell: I am going to have to object to that question, your Honor. Referring again to the refund claim—

The Court: Will you read the question, Mr. Reporter?

(Question read.)

Mr. Mitchell: On the ground that that issue is not [57] properly before the Court, the amount of distributable undistributed income on hand at the time of decedent's death. That is the question, is it? Relates to both.

Mr. Robinson: That is right.

Mr. Mitchell: On the ground that the refund claim relates only to the corpus of the trust, and until the trustee exercises its option to declare that income corpus principal, instead of income, distributable income, a discretionary power given it by the trust indenture, the question is not material and is not supported by the refund claim; it is not supported by the tax return, the estate tax return; it is not supported by the letter of the Commissioner rejecting the refund claim; it is not supported, even, by the alleged amendment entitled "Protest," that has been identified; and it is not supported by the complaint. The complaint refers only to the corpus of the trust and relates only to the question of 100 per cent of the value of the corpus, or one-half of 100 per cent of the value of the corpus is includable in the gross estate.

I will call your Honor's attention to the bottom of page 43 of the stipulation of facts, line 24: "The crea-

(Testimony of Charles S. Martell)

tion of such trusts effected between decedent and his wife a property settlement agreement to the effect that each would be vested at the time of the creation of each of said trusts with an undivided one-half interest in the property which comprised the corpus of the trust." [58]

The Court: Is it your contention that they were each to have one-half of the corpus, but neither one of them was to have any interest in the income?

Mr. Mitchell: Oh, no, no, your Honor. The declarations of trust—this particular declaration of trust, I believe, if I am not mistaken, gave to the spouses— [59]

* * * * *

The Court: Assuming that that objection is good, this evidence should be admitted for the final computation to determine if it was all put into one sum, and if your objection is good you would never know what the proper tax was. [64]

* * * * *

The Court: Objection overruled and exception allowed, not passing, however, on the other half of the objection at this time.

Mr. Mitchell: Then, it is admitted for the purpose of computation after the trial? [65]

The Court: Yes.

Q. By Mr. Robinson: What is that amount, Mr Martell? A. \$1,749.56.

Q. Seventeen hundred and forty-nine dollars and fifty-six cents? A. Fifty-six cents. [66]

* * * * *

(Testimony of Charles S. Martell)

Cross Examination

By Mr. Mitchell:

Q. Mr. Martell, what were the type of assets? Do your files indicate the type of assets contained in this particular trust? [67]

* * * * *

Mr. Mitchell: Trust No. 1052 is Exhibit J and appears on page 75 of the stipulation of facts; and the first paragraph of this Exhibit J, that is, the declaration of trust, No. 1052, refers to a schedule attached to it and marked Exhibit A and made a part of it.

Q. Have you a copy of that?

A. Yes; I have a copy of it.

Q. May I see it, please? This Exhibit J which you have handed me, stamped on the bottom, "The original in the vault" purports to list many street improvement bonds of the City of Glendale. Were you representing the bank at the time this trust was created?

A. What was the date?

Q. 1052. The date of the trust—I will have to refresh my memory—1925.

The Court: The 2nd of November, 1925.

Mr. Mitchell: November 2, 1925, right.

A. No; I was not with the company then.

Q. You were not. When did you come with the company? A. March of '26; March, 1926. [70]

* * * * *

Mr. Mitchell: If the Court please, we would like to complete the stipulation of facts in respect of several items and one or two corrections.

Exhibit H, attached to the stipulation of facts, omitted an amendment that was made March 30, 1929, and we desire to read into the record the amendment. We only have [74] the one copy. "Amendment of declaration of trust of Citizens National Trust and Savings Bank of Los Angeles, Trust No. 2012.

"Know All Men By These Presents that the Citizens National Trust and Savings Bank of Los Angeles, a national banking association, with its principal place of business at the City of Los Angeles, State of California, hereinafter sometimes called 'Trustee' makes and issues this, its amended declaration of trust to its declaration of trust in Trust No. 2012 wherein the Citizens Trust and Savings Bank of Los Angeles was Trustee and which bank has now been succeeded by the said Citizens National Trust and Savings Bank of Los Angeles, a national banking association, and wherein the said Peter L. Ferry and Catherine B. Ferry are trustors, said original declaration of trust bearing date of April 9, 1925.

"Whereas the said Peter L. Ferry and Catherine B. Ferry, trustors, desire to amend said original declaration of trust and have under date of March 19, 1929, duly requested that said amendment to said declaration of trust be made in writing so that said declaration of trust will include their son Patrick Robert Ferry, born March 17, 1929, as one of said beneficiaries.

"Now, therefore, said original declaration of trust known as the Citizens Trust and Savings Bank of Los Angeles Trust No. 2012 and dated April 9, 1925, is hereby amended in [75] the following manner, to-wit:

"On line 15, page 2, after the name 'William F. Ferry,' there shall be added the name of 'Patrick Robert Ferry';

"And on line 16 on page 4, after the name 'William F. Ferry,' there shall be added the name of 'Patrick Robert Ferry,' it being the intention of the trustors that their son, Patrick Robert Ferry, born March 17, 1929, shall be one of the beneficiaries of the said trust and shall share equally as to the income and principal of the trust estate in the same manner as the other male children of said trustors and in like proportion.

"Excepting as hereinabove changed and modified, said declaration of trust is hereby re-published, ratified and confirmed in each and every provision therein.

"In Witness Whereof said Citizens National Trust and Savings Bank of Los Angeles, as trustee, has caused its corporate name to be subscribed and its corporate seal to be affixed hereunto by its Vice-President and Assistant Trust Officer. Duly authorized this 30th day of March, 1929, at the City of Los Angeles, State of California."

The seal. Signed "Citizens National Trust and Savings Bank of Los Angeles, Trustee, by Halcott B. Thomas, Vice President, by Victor J. Johnson, Assistant Trust Officer."

And beneath those signatures appears the certificate of the trustors, reading as follows:

"We, the undersigned, hereby certify that we are [76] husband and wife and trustors named in the above and foregoing declaration of trust and amended declaration of trust and therein called 'Trustors' and that said declaration of trust and said amended declaration of trust fully and correctly set out the terms and trusts under and upon which the property therein mentioned is to be held, managed and disposed of by the trustee therein named;

and we do hereby jointly and severally agree, consent, approve, ratify and confirm said original declaration of trust as amended by this amended declaration of trust, and we do confirm said original declaration of trust as amended hereby in all particulars.

"Dated this 1st day of April, 1929, at Los Angeles, California.

"(Signed) Peter L. Ferry,
Catherine B. Ferry, Trustors."

And that is an amendment—I have lost the stipulation of facts.

The Court: It is Exhibit No. 1, Exhibit H attached thereto.

Mr. Mitchell: It is an amendment of Exhibit H attached to the stipulation of facts.

The Court: Will you give me the places where they were inserted and I will insert them?

Mr. Mitchell: Exhibit H, would be at the end of Exhibit H. [77]

The Court: No, but you have the name inserted prior to that. Where is the first place you insert the name of Patrick Robert Ferry?

Mr. Mitchell: Several places, two or three places. Wherever the children are listed. It follows William F. Ferry's name.

The Court: Paragraph 2, is that the first place? If you read from your original, Mr. Mitchell, I can follow you.

Mr. Mitchell: Yes. I did not attempt to make the changes in the trust, because the declaration of amendment is merely to be added to the trust. But I find in Paragraph 2 the names of the children, so that after

"William L. Ferry" would be added the name of "Patrick."

The Court: That is right. Now, just a moment.

Mr. Mitchell: Of course, the lines and pages in that stipulation of facts do not correspond with the amendment at all.

The Court: No; that is right.

Mr. Mitchell: The next one I find, your Honor, would be on page 63, line 17, where the children are listed.

The Court: I was sure it was there.

Mr. Mitchell: The next one would be line 24 of the same page 63, following William F. Ferry's name. I find no others.

Instead of reading the amendment of Exhibit J, Trust [78] No. 1052, which is on page 75—oh, by the way, there is a mistake there. The word "Perry" appears instead of "Ferry." Page 75, lines 10 and 11, that should be "F-e-r-r-y" instead of "P-e-r-r-y". Does your Honor find that?

The Court: Yes; and I have it corrected.

Mr. Mitchell: Then, a similar amended declaration of Trust, dated March 3, 1930, was made by the Trustors, Mr. and Mrs. Ferry, in respect of the new son Patrick; so that the same change would apply to that Trust No. 1052 which is Exhibit J. Then, on page 88, line 1, the word "thereof" should be changed to "hereof," line 1, page 88 of the stipulation.

Another error is the reversal of pages 108 and 109. Page 109 should precede 108.

Mr. Robinson: Is that all?

Mr. Mitchell: I think those are all the corrections; yes.

Mr. Robinson: Mr. Ferry.

JAMES L. FERRY,

called as a witness by and on behalf of Plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: Your full name?

The Witness: James L. Ferry. [79]

Direct Examination

By Mr. Robinson:

Q. You are the son of Peter L. Ferry, deceased?

The Court: Just a minute. I haven't got these corrections.

Mr. Robinson: I am sorry.

The Court: In 1052 I only find the names of the children in one place.

Mr. Mitchell: That would be the only amendment then.

The Court: You mean 109 should precede 108?

Mr. Mitchell: 109 should precede 108.

The Court: I will make "109" "108" and I will make "108" "109".

Mr. Mitchell: That will take care of it.

Q. By Mr. Robinson: You are the son of Peter L. Ferry? A. Yes; that is right.

Q. The same Peter L. Ferry, the matter of whose estate is at issue here? A. That is right. [80]

* * * * *

Q. Are you familiar with the health of your father during, say, the last 10 or 15 years of his life?

A. Yes; I am.

Q. Approximately how many hours a day, if you know, did he attend to business?

A. Oh, I would say he would put in anywhere from 10 to 12 hours every day.

(Testimony of James F. Ferry)

Q. Up until what time?

A. Right up until the time of his death.

Q. Right up until the time of his death. Was some of that in connection with—what business was he at that time [83] then in?

A. Well, that was in his contracting business and in the ranch. [84]

* * * * *

Q. What is your occupation?

A. General contractor.

Q. How long have you been so engaged? [86]

A. Oh, for the past 10 years.

Q. When was the first time that you started in the general contractor business, about?

A. Well, I started in business about—well, I started working for my father in 1929. We were not doing much contracting at the time. We were mostly renting contractors' equipment at that time; and in 1933 I went into the business for myself.

Q. Did you have any assets in the business you started in by yourself in 1933?

A. No. I beg your pardon. I started in 1931.

Q. 1931? A. When I started in business.

Q. Did you have any assets? A. No.

Q. Did you acquire any assets?

A. Well, I bought out my father's business in 1931.

Q. What were the circumstances in connection with that purchase?

A. Well, I was to pay for it as I earned money out of the business.

(Testimony of James F. Ferry)

Q. Did you have any conversation with your father relative to the purchase of that business?

A. Oh, yes; I talked to him.

Q. When was it? Just answer yes or no. You did have? [87]

A. Yes.

Q. About when was that conversation?

A. Oh, that would be—

Q. Just approximately.

A. Some time in September of '31.

Q. And who was present? A. My father.

Q. And you were present?

A. Yes; that is right.

Q. What was the conversation?

A. Well, I went to him and I asked him about buying out the business. I was thinking about getting married and I wanted to get in for myself, and he was spending most of his time at the ranch, and I wanted to take over and run the business. So we talked over price and so forth. And then he says that I would have to go to my mother and get my mother's permission, because she owned half of the business; that he always considered that 50 per cent of the business was hers and that I would have to get her O.K. before the deal would be final.

Q. By "the business" did he refer to all of his business, or just to the business—

A. No; that was just contracting and of the equipment end of the business.

Q. Anybody else sit in on the conversation?

A. Not that I remember of; no. [88]

Q. Then, following your conversation did you have a conversation with your mother or not?

A. Yes; I talked it over with my mother.

(Testimony of James F. Ferry)

Q. Who was present at that time, and where was the conversation?

A. Well, that took place in my father's office, and my mother and my father and myself were there.

Q. That was after the first conversation?

A. That is right.

Q. Can you tell what that conversation was, what you said, what your mother said, and what your father said?

The Court: The approximate date and place.

Q. By Mr. Robinson: The approximate date of that was when?

A. It was some time in September of 1931.

Q. And you have testified that it was at your father's office? A. Yes.

Q. And where was that?

A. That was in Glendale, California.

Q. What was the conversation?

A. Well, it was about the same as what it was with my father. I put the proposition up to my mother that I would buy out the business.

Q. And did you assign any reason for asking her, or what was the conversation? [89]

A. Well, the reason I had to ask her was on account of my father told me that I would have to get her permission along with his: that she would have to O.K. the deal, too.

Q. What was the conversation with your mother?

A. Well, I got her O.K. She said it was all right; that would be a good thing to get me started in business. She was glad to see me do it.

(Testimony of James F. Ferry)

Q. Did she make any offer to sell you, or agree to it, or what were the circumstances?

Mr. Mitchell: Are you asking for a conversation between the witness and his mother or between the witness and his father?

Mr. Robinson: All three of them were present.

Mr. Mitchell: Oh.

Q. By Mr. Robinson: I show you a document dated September 29, 1931, on the letter head entitled "Peter L. Ferry, General Contractor," and ask you if you recognize the three signatures at the bottom: "Peter L. Ferry, Catherine B. Ferry, James L. Ferry"?

A. Yes; I recognize them.

Q. And those are the signatures of your father, Peter L. Ferry—

A. That is right.

Q. —and your mother, Catherine B. Ferry—

A. That is right.

Q. —and of yourself? [90]

A. That is right.

Q. And when and where was that document executed?

A. This was executed in our office at that same day that we talked.

Q. The same day that the three of you talked?

A. That is right.

Q. Following the conversation this document was executed, is that right?

A. That is right.

Q. Was there any conversation as to the reason your mother, Catherine B. Ferry's name was placed on that document at that time?

Mr. Mitchell: I can't hear.

Mr. Robinson: I am sorry.

The Court: Mr. Reporter, repeat the question.

(Question read.)

(Testimony of James F. Ferry)

Mr. Mitchell: If the Court please, I just want to make my same objection. I assume that this evidence is in some way related to the Plaintiff's theory of tracing the insurance premiums, is that correct?

Mr. Robinson: I have misled you, Mr. Mitchell. I am endeavoring to support the contention that there was a property settlement agreement between the parties.

Mr. Mitchell: If that is the purpose, I have no objection.

Mr. Robinson: Will you repeat the question? [91]

The Court: Will you identify this document so we know what we are talking about?

The Clerk: Plaintiff's Exhibit 5, for identification.

(The document referred to was marked as Plaintiff's Exhibit No. 5, for identification.)

[Note: Plaintiff's Exhibit No. 5 will be found in the Book of Exhibits at page 625.]

Mr. Mitchell: I will, though, object to this testimony and these documents on the ground that they do not tend to show any property settlement agreement in any way, shape, or form; they do not even tend to show a property settlement agreement in 1931, which I assume is the time of the alleged agreement?

Mr. Robinson: No.

Mr. Mitchell: 1925?

Mr. Robinson: This is simply in ratification. I simply offer the statement which I will tie in at a later date by the testimony of Mrs. Ferry.

The Court: All right, proceed.

Mr. Robinson: Will you read the question to the witness, Mr. Reporter?

(Testimony of James F. Ferry)

The Court: What did your mother say at the time, or what was the reason given for signing it?

The Witness: The reason, he told me my mother owned half of the business and that I would have to get her to sign it for her half before the deal would be completed.

Mr. Robinson: I offer that letter into evidence.

The Court: In evidence. [92]

Mr. Mitchell: The same objection on the same grounds.

The Court: Overruled. In evidence.

The Clerk: Plaintiff's Exhibit 5 into evidence.

(The document referred to was received in evidence and marked Plaintiff's Exhibit No. 5.)

Q. By Mr. Robinson: I show you a letter dated September 29, 1931, likewise on the stationery of "Peter L. Ferry, General Contractor."

The Court: What is the date, now?

Mr. Robinson: Same date, September 29, 1931.

Q. With the same three names on there as before, which letter refers to a lease covering Lots Nos. 1 to 9, in Tract No. 6699, and ask you if you recognize those signatures?

A. Yes; I recognize all three of them.

Q. Those are the signatures of your father, your mother and yourself?

A. That is right.

Q. What were the circumstances under which that document was executed?

A. Well, this lease covered the ground that we had our offices and yard on that we operated out of, and I was turning around and leasing it from them in order that I could carry on the business in the same place.

(Testimony of James F. Ferry)

Q. Was any reason assigned in the conversation for the reason that your mother put her signature on there?
[93]

A. Yes. Half of it was hers and half was his, and therefore they both had to sign it before it was completed.

Q. When you say half of it was hers, what do you mean?

A. Half of the property. Half of the property belonged to my mother and half to my father.

Mr. Mitchell: Who said this?

The Witness: My father.

Q. By Mr. Robinson: At that time was any reference made in the conversation to any other property of your mother's and father's?

A. Not at that time; no. Not at that time that I remember of.

Mr. Robinson: I offer the letter into evidence.

Mr. Mitchell: The same objection on the same grounds.

The Court: It will be received.

The Clerk: Plaintiff's Exhibit No. 6 into evidence.

(The document referred to was received in evidence and marked Plaintiff's Exhibit No. 6.)

[Note: Plaintiff's Exhibit No. 6 will be found in the Book of Exhibits at page 627.]

Q. By Mr. Robinson: I show you a document on which, written in ink at the top, is "Oct 1 1931", with "October" abbreviated, and ask you if you have ever seen that document before.

A. Yes, I have seen it before.

(Testimony of James L. Ferry)

Q. What name is at the bottom there?

A. That is my father's name. [94]

Q. How is it spelled? A. Well, it is "P-t."

Q. "P-t"? A. "P-e-t" is what is it, "L. Ferry."

Q. Then is written "Paid in full January 1, 1933, Peter L. Ferry." I ask you if you know the circumstances under which that document was executed?

A. Yes. After I started to take over the business and run it there for two years, a little over two years, I was having such a tough time to make a go of things during the depression, and so forth, that I went to my father and told him that I couldn't live up to the agreement that we had made, that is, the amount, etc., and that he was going to have to reduce it down, which he did at that time; and we figured out about what money the business had made up to that time and then he marked that "Paid in full." And then he told me to go ahead and run it as we had been running it until things equalled out and the business got going again.

Q. And how long was it before you had the business paid for?

A. It was sometime in 1935, the first part of '35.

Q. Did you have any conversation with your mother relative to this transaction?

A. Yes. I took it up with my mother.

Q. And when did you take it up? [95]

Mr. Mitchell: Was this at the time the last bill of sale was executed?

Mr. Robinson: At the time of the document we are referring to.

(Testimony of James L. Ferry)

The Court: Which one is that, which document? You discussed one dated October 31, 1931, and then you got some other place.

Mr. Mitchell: It is endorsed at the foot of the cancellation of the unpaid balance "Paid in full January 1, 1933", and then he testified to something else in 1935.

The Court: I have not seen that instrument.

(Mr. Robinson handing paper to the clerk.)

The Clerk: That will be Plaintiff's Exhibit 7 for identification.

(The document referred to was marked for identification as Plaintiff's Exhibit No. 7.)

Q. By Mr. Robinson: What date was it that you had a conversation with your mother relative to this?

A. Oh, I can't remember the exact date. It was right around the first of the year.

Q. Of what year?

A. Or the last, the last of '32.

Q. Do you recall what that conversation was?

Mr. Mitchell: That will be objected to on the ground that, perhaps, it is a self-serving declaration, and the fact that the other party to the conversation is here to testify.
[96]

Q. By Mr. Robinson: Who was present at this conversation?

A. It was between my mother and myself.

Q. Was your father present or anybody else?

A. My father was present; yes.

Q. What was the conversation?

(Testimony of James L. Ferry)

Mr. Mitchell: Further objected to, as the place has not been fixed.

Q. By Mr. Robinson: Where was the place?

A. It was at my father's and mother's home in Glendale.

Q. What was the conversation?

A. Well, I am kind of lost, myself, now with reference to what—

Mr. Mitchell: I object, of course, to this question on the ground that it is self-serving, the answer called for is self-serving—would be self-serving; statements made by the plaintiff outside of the presence of the defendant would certainly not be binding.

Mr. Robinson: There could never be a situation where the defendant would be present in a tax case, and we have a matter where the decedent is dead and I want to show what his conversation was, the conversation of a deceased individual.

Mr. Mitchell: I think the conversation with decedent relating to an issue in the case might be admissible; but a conversation with a plaintiff who is living and in court [97] ready to testify would be self-serving.

The Court: I kind of think that is correct, counsel.

Mr. Robinson: I would like to make an offer of proof. I intended to show by the conversation that the three of them were present and Mr. Ferry stated that it was necessary for James Ferry to get the consent of his mother before they altered the original agreement of 1931. He made the further statement that everything he had, half of everything, not only the business, but everything, belonged to Mrs. Ferry.

(Testimony of James L. Ferry)

The Court: These are statements by the decedent, not by Mrs. Ferry?

Mr. Robinson: That is right. And Mrs. Ferry said that she would agree that her one-half could be transferred, and that as a result of that it was transferred.

The Court: Proceed. [98]

* * * * *

The Court: First, fix the time, who was present, and then give the conversation.

A. That was the end of January or end of December of 1932; and it took place in my mother's and father's home in Glendale.

Mr. Mitchell: May I ask whether it was before or after the conversation to which you have already testified?

Q. By Mr. Robinson: Was it before or after the conversation with your father?

A. It was afterwards. [100]

Mr. Mitchell: All right.

Q. By Mr. Robinson: And what was the conversation?

A. Well, I put the same story up to my mother at that time as I did my father; that I was having a hard time to make a go of the business, the machinery that I was using was wore out, etc., and I was just having a tough time and I had to have the price reduced that we had agreed on in order to make a go and keep on going. And my mother agreed on that at that time; said it was all right as far as she was concerned.

Q. Was any declaration made by your father concerning the properties of himself and your mother?

Mr. Mitchell: I submit, your Honor, that is a leading question.

(Testimony of James L. Ferry)

Q. By Mr. Robinson: Was there any further conversation?

A. Not at that time that I can remember of; no.

Q. Did you keep track of the proceeds that you paid from the business to your mother and your father from that time until you stopped in the early part of 1935?

A. Yes; that is right.

Q. Did you keep books and records of those?

A. Yes; I had a set of books.

Q. Where are those books and records?

A. Well, I still have some of them, but how far back—I don't know how far back they would go, but I still have [101] some.

Q. Do you have any records showing the amount of these payments?

A. Of which payments?

Q. Of the disbursements from the business in the purchase thereof.

A. No.

Q. You have nothing on that?

The Court: You operated the business for about a year and three months prior to the time that you received this receipt in full, is that correct?

A. That is correct, your Honor.

Q. By Mr. Robinson: But after you received the receipt in full you still continued to pay moneys over until about 1935, pursuant to the understanding, is that right?

A. That is right; yes.

Q. I show you here a check drawn on the "Head Office First National Bank" at Glendale, No. 1010, check number, under date of April 15, 1935, "Payable to the order of Equitable Life Assurance Society" in the sum of \$346.79, with the notation on the side "Int. on Policies No. 2145686 to 91" and ask you—

(Testimony of James L. Ferry)

Mr. Mitchell: Excuse me for interrupting, but may I ask the reporter to read the judge's question and the witness' answer? I did not quite get the first part of it.

(Record read by the reporter as requested.) [102]

The Court: Exhibit 7.

Mr. Mitchell: Yes.

Q. By Mr. Robinson: (Continuing) I ask you if you know what that check is, Mr. Ferry?

A. Yes; I know what it is.

Q. What is it?

A. It was a check that I gave out of the account of Peter L. Ferry & Son to pay the premium on one of my father's insurance policies.

Q. Did you charge anybody for that payment?

A. Yes. Whenever I made a payment like that out of my funds, out of the "yard fund", what we called it, it was always charged back to my father and my mother.

Q. In other words, that particular payment was charged to your father and your mother?

A. That is right; yes.

Q. Do you recall in what proportions?

A. No; I don't recall what proportions.

Q. Was it 50-50 or 60-40, or how do you mean you charged them?

A. Well, I just had one account set up for my father and mother. Anything I paid for them it was just charged to the account.

Mr. Mitchell: I move the answers of the witness to the last two questions be stricken on the ground that they are not the best evidence. I believe the records to which [103] he refers are the best evidence.

(Testimony of James L. Ferry)

Mr. Robinson: I believe it has been established that there are no records now in existence that refer to those payments paid to the father and the mother.

Mr. Mitchell: I am referring to the charges, to the charges that were made on the witness' books.

The Court: He says they are not in existence. You can question him, Mr. Mitchell, to lay a further foundation for objection.

Mr. Mitchell: May I ask him?

Mr. Robinson: Go right ahead.

The Court: Proceed.

Q. By Mr. Mitchell: In what form were these records?

A. Do you mean what kind of a set of books we kept?

Q. Yes.

A. We kept a regular set of books.

Q. You say "we". Whom do you mean?

A. When I say "we" I mean me and the bookkeeper, whoever worked in the office then.

Q. Who was your bookkeeper at that time?

A. Mr. Bourke Irke.

Q. Can the last name be spelled out?

A. Irke, I-r-k-e.

Q. Now, this account with your father and mother, the account was to show payments on account of the purchase price that you had agreed to pay, is that right?

[104] A. That is right; yes.

Q. When you paid the insurance premium you credited yourself and charged them? A. That is right.

Q. With the amount and credited yourself on the purchase price of the business?

A. That is right; yes.

Mr. Robinson: I offer this check into evidence.

(Testimony of James L. Ferry)

Q. By Mr. Mitchell: Where are these records?

A. I don't know. They have all been destroyed.

Q. Why were they destroyed?

A. Well, we generally keep the records for five years, something like that, then after that—

Q. When were the records destroyed?

A. Oh, I can't tell you the exact date that they were destroyed. I know right after the first of the year we always clean out our files and burn a lot of the papers, and I imagine that is when they were burnt.

Q. You do that at the end of each year?

A. Yes.

Q. Showing your credits and debits of the business for the previous year?

A. Not for the previous year; no, for the years away back. No; we always keep our books for at least five years.

Q. You have books now for the past five years, showing [105] your receipts and disbursements during the past five years? A. Yes.

Mr. Robinson: I offer that check No. 1010 into evidence.

The Court: In evidence.

The Clerk: That will be Plaintiff's Exhibit 8 into evidence.

(The document referred to was received in evidence and marked Plaintiff's Exhibit 8.)

[Note: Plaintiff's Exhibit No. 8 will be found in the Book of Exhibits at page 629.]

Q. By Mr. Robinson: I show you check drawn on The First National Bank in Glendale, being check No. 877, under date of March 29, 1935.

(Testimony of James L. Ferry)

Mr. Mitchell: Excuse me. May I ask, was this a joint account with some one?

A. It was not a joint account, no; but my father had the right to sign on it.

Q. He had the right to draw money on account?

A. He had a right to draw money on the account; yes, sir.

Q. Did he ever draw money on this account?

A. Yes; he drew money in that account.

Q. For his personal expenses?

A. For his personal expenses and his own expenses, or—

Q. To support his minor children?

A. That is right.

Q. By Mr. Robinson: How were those charges treated? [106]

A. They were always charged back to his account and my mother's account.

Q. I show you this check No. 877 in the sum of \$130.44, payable to the Lincoln National Life Insurance Company on policy M67233T, and ask if you know what that is?

A. Yes. That is another premium that I paid on my father's insurance.

Q. What entry did you make in regard to that?

A. That was charged back to their account.

Mr. Robinson: I offer that into evidence.

The Court: In evidence.

The Clerk: Plaintiff's Exhibit 9 into evidence.

(The document referred to was received in evidence and marked Plaintiff's Exhibit No. 9.)

[Note: Plaintiff's Exhibit No. 9 will be found in the Book of Exhibits at page 629.]

(Testimony of James L. Ferry)

Q. By Mr. Robinson: I show you check No. 413, drawn on The First National Bank in Glendale, for the sum of \$130.72, to Metropolitan Life Insurance Company on policies 1032491-1032329, and ask you if you have seen that check before?

A. Yes; I have seen that before.

Q. And what was it?

A. Well, this was a check that my father wrote on my account to pay for the premium on this insurance here.

Q. And what charge, if any, did you make in regard to that check?

A. It was charged back to their account. [107]

Mr. Robinson: I offer that check into evidence.

The Court: In evidence.

The Clerk: Plaintiff's Exhibit 10 into evidence.

(The document referred to was received in evidence and marked Plaintiff's Exhibit No. 10.)

[Note: Plaintiff's Exhibit No. 10 will be found in the Book of Exhibits at page 629.]

Q. By Mr. Robinson: I show you check No. 1051, under date of May 7, 1935, in the sum of \$143.22, payable to Provident Mutual Life Insurance Company, the notation thereon "Yearly Premium on Policies 186434 and 186435," and ask you if you know what that is?

A. Yes. That is another check that I wrote myself on my account to pay my father's insurance premium.

Q. And what entry did you make in regard to that?

A. And that was charged back to their account.

Mr. Robinson: I offer that into evidence.

The Court: In evidence.

(Testimony of James L. Ferry)

The Clerk: Plaintiff's Exhibit 11 into evidence.

(The document referred to was received in evidence and marked Plaintiff's Exhibit No. 11.)

[Note: Plaintiff's Exhibit No. 11 will be found in the Book of Exhibits at page 629.]

Q. By Mr. Robinson: Do you know what bank accounts that your father maintained during his lifetime, or your father or your mother maintained during his lifetime?

A. He had one at the California Bank, one at the Citizens Bank, and one at The First National Bank at Glendale. That is about all that I remember of.

Q. Are you familiar with the insurance that was out-[108] standing upon the life of your father?

A. Yes; I am fairly well familiar with it.

Q. On the numerous policies of insurance do you know in which manner each and all of the premiums were paid, whether paid by cash or by check or in what manner?

A. They were always paid by check.

Q. On what bank accounts were they drawn?

A. There was no particular bank account. It was either one of those three.

Mr. Mitchell: If you have the checks, Mr. Robinson, they probably would be the best evidence of what banks they were drawn on.

Mr. Robinson: I have not the complete checks.

The Court: The four checks in evidence were all drawn on The First National Bank in Glendale.

Q. By Mr. Robinson: What is your testimony that your father never paid cash on any premiums; it was always drawn on check—

(Testimony of James L. Ferry)

Mr. Mitchell: Now, just a minute. It is very leading.

Mr. Robinson: I will withdraw the question, withdraw the question.

Q. I show you check dated April 2, 1935, in the sum of \$542.18, the notation thereon "Payment on Policies less cash dividends," checks of The First National Bank in Glendale.

Mr. Mitchell: May I see that? Did I see this before?

Mr. Robinson: You have not seen it before. [109]

The Court: What is the check number, Mr. Mitchell?

Mr. Mitchell: 883.

The Court: Amount?

Mr. Robinson: The First National Bank in Glendale.

The Court: The amount?

Mr. Mitchell: You had better read it.

Mr. Robinson: \$542.18.

Q. (Continuing) I ask you if you have seen that check before.

A. Yes; I have seen it before.

Q. And what was it for?

A. That was another—

Mr. Mitchell: I think it speaks for itself.

A. That is another insurance premium that I paid out of the account for my father.

Mr. Robinson: To speed it up, Mr. Mitchell—

The Court: It does not always speak for itself. It may have been a re-payment of a loan, Mr. Mitchell, you know.

Mr. Robinson: —will you stipulate that these checks that I have introduced were payments on policies that are included in the taxable estate here?

Mr. Mitchell: I would naturally have to check them, first. I have never seen these checks before.

The Court: All right.

Mr. Robinson: I offer this check into evidence. [110]

The Court: In evidence. What is the company?

Mr. Robinson: What was the company? The Equitable Life Insurance Society.

The Court: All right.

The Clerk: Plaintiff's Exhibit 12 into evidence.

(The document referred to was received in evidence and marked Plaintiff's Exhibit No. 12.)

[Note: Plaintiff's Exhibit No. 12 will be found in the Book of Exhibits at page 629.]

Mr. Robinson: Mr. Mitchell, do you desire to stipulate with me relative to these policies?

Mr. Mitchell: Why, yes; I have no objection to the policies going in. You have the originals. [111]

* * * * *

Mr. Robinson: What is your first number, Mr. Mitchell, if you will read it to me?

Mr. Mitchell: "2,145,686."

Mr. Robinson: "2,145,686"?

Mr. Mitchell: That is right. That is the lowest number.

Mr. Robinson: Policy of the Equitable Life Assurance Society on the life of Peter L. Ferry offered into evidence.

The Clerk: Plaintiff's Exhibit 13 into evidence.

(The document referred to was received in evidence and marked Plaintiff's Exhibit No. 13.) [112]

[Note: Plaintiff's Exhibit No. 13 will be found in the Book of Exhibits at page 630.]

* * * * *

Mr. Robinson: 2,145,687, Policy of Equitable Life Assurance Society on the life of Peter L. Ferry in the amount of \$4,597.20, under date of April 12, 1916.

Mr. Mitchell: Rewritten June 20th, 1930.

The Clerk: Plaintiff's Exhibit 14 into evidence.

(The document referred to was received in evidence and marked Plaintiff's Exhibit No. 14.)

[Note: Plaintiff's Exhibit No. 14 will be found in the Book of Exhibits at page 638.]

Mr. Robinson: 2,145,688, Equitable Life Assurance Society policy upon the life of Peter L. Ferry in the amount of \$4,597.20 under date of April 12th, 1916, offered into evidence.

Mr. Mitchell: Rewritten June 20th, 1930.

The Clerk: That will be Plaintiff's Exhibit 15 into evidence.

(The document referred to was received in evidence and marked Plaintiff's Exhibit No. 15.)

[Note: Plaintiff's Exhibit No. 15 will be found in the Book of Exhibits at page 642.]

Mr. Mitchell: I think these were all rewritten on June 20th, 1930, but the endorsement would be right under the date. [113]

Mr. Robinson: Is not this the original policy?

Mr. Mitchell: No. It is the one you gave me.

Mr. Robinson: It is the one the company gave me.

Mr. Mitchell: It is a rewritten policy. It is the policy as it existed at the time of death.

Mr. Robinson: There is no issue between us, Mr. Mitchell, but what we are referring to the same policies, is there?

Mr. Mitchell: Oh, no. You will find a request for change of policy is also attached in each case, a document entitled "Request for change of policy."

The Court: Were these not included in the stipulation of facts, gentlemen?

Mr. Mitchell: No, your Honor. They did not come in time.

The Court: All right.

Mr. Mitchell: They all had to be photostated.

Mr. Robinson: I offer into evidence policy No. 2,145,689; the company is the Equitable Life Assurance Society; on the life of Peter L. Ferry, under date of April 12th, 1916, and rewritten June 20th, 1930.

The Clerk: Plaintiff's Exhibit 16 into evidence.

(The document referred to was received in evidence and marked Plaintiff's Exhibit No. 16.)

[Note: Plaintiff's Exhibit No. 16 will be found in the Book of Exhibits at page 646.]

Mr. Robinson: I offer into evidence Equitable Life Assurance Society Policy No. 2,145,690, upon the life of [114] Peter L. Ferry, in the amount of \$5,000, under date of April 12th, 1916, rewritten June 20th, 1930.

The Clerk: Plaintiff's Exhibit 17 into evidence.

(The document referred to was received in evidence and marked Plaintiff's Exhibit No. 17.)

[Note: Plaintiff's Exhibit No. 17 will be found in the Book of Exhibits at page 649.]

Mr. Robinson: I offer into evidence policy No. 2,145,691, Equitable Life Assurance Society, upon the life of Peter L. Ferry, in the sum of \$5,000, under date of April 12th, 1916, and rewritten June 20th, 1930.

The Clerk: That is Plaintiff's Exhibit 18 into evidence.

(The document referred to was received in evidence and marked Plaintiff's Exhibit No. 18.)

[Note: Plaintiff's Exhibit No. 18 will be found in the Book of Exhibits at page 651.]

Mr. Robinson: I offer into evidence policy No. 2,481,-456 of the Equitable Life Assurance Society, upon the life of Peter L. Ferry, \$6,611.20, under date of August 1st, 1919, and rewritten June 20th, 1930.

The Clerk: Plaintiff's Exhibit 19 into evidence.

(The document referred to was received in evidence and marked Plaintiff's Exhibit No. 19.)

[Note: Plaintiff's Exhibit No. 19 will be found in the Book of Exhibits at page 653.]

Mr. Robinson: I offer into evidence policy No. 2,481,-457, Equitable Life Assurance Society, in the sum of \$5,000, upon the life of Peter L. Ferry, under date of August 1st, 1919, and rewritten June 20th, 1930.

The Clerk: Plaintiff's Exhibit 20 into evidence. [115]

(The document referred to was received in evidence and marked Plaintiff's Exhibit No. 20.)

[Note: Plaintiff's Exhibit No. 20 will be found in the Book of Exhibits at page 655.]

Mr. Robinson: I offer into evidence policy of The Provident Life and Trust Company of Philadelphia, No. 186434, in the sum of \$5,000, upon the life of Peter L. Ferry, under date of—

Mr. Mitchell: "Sixth day of Fifth month" of the year 1912.

Mr. Robinson: It is May 6, 1912.

The Clerk: Plaintiff's Exhibit 21 into evidence.

(The document referred to was received in evidence and marked Plaintiff's Exhibit No. 21.)

[Note: Plaintiff's Exhibit No. 21 will be found in the Book of Exhibits at page 659.]

Mr. Robinson: I offer into evidence policy No. 186435 of The Provident Life and Trust Company of Philadelphia—

Mr. Mitchell: Wait a minute. What is the number?

Mr. Robinson: 186435.

Mr. Mitchell: Wait until I find that. 186435, all right.

Mr. Robinson: Of The Provident Life and Trust Company of Philadelphia, in the sum of \$5,000, upon the life of Peter L. Ferry, under date of the sixth day of the fifth month, 1912.

The Clerk: Plaintiff's Exhibit 22 into evidence.

(The document referred to was received in evidence and marked Plaintiff's Exhibit No. 22.)

[Note: Plaintiff's Exhibit No. 22 will be found in the Book of Exhibits at page 661.]

Mr. Robinson: I offer into evidence policy No. [116] 319963 on The Provident Life and Trust Company of Philadelphia, upon the life of Peter L. Ferry, in the sum of—

Mr. Mitchell: The second line, "Five hundred thirty-nine and 60/100 Dollars."

Mr. Robinson: No; that is premium.

Mr. Mitchell: Oh, excuse me. The third line, no.

Mr. Robinson: On the face "Commuted value the sum of \$18,220."

The Clerk: Plaintiff's Exhibit 23 into evidence.

(The document referred to was received in evidence and marked Plaintiff's Exhibit No. 23.)

[Note: Plaintiff's Exhibit No. 23 will be found in the Book of Exhibits at page 663.]

Mr. Robinson: I offer into evidence the policy of The Provident Life and Trust Company of Philadelphia No. 319964, upon the life of Peter L. Ferry, in the sum of \$18,220.

The Clerk: Plaintiff's Exhibit 24 into evidence.

(The document referred to was received in evidence and marked Plaintiff's Exhibit No. 24.)

[Note: Plaintiff's Exhibit No. 24 will be found in the Book of Exhibits at page 666.]

Mr. Robinson: I offer into evidence policy of Provident Mutual Life Insurance Company—

* * * * *

Mr. Robinson: Provident Mutual Life Insurance Company of Philadelphia, No. 437471, upon the life of Peter L. Ferry— [117]

Mr. Mitchell: \$19,000, the face amount on the top line.

Mr. Robinson: In the sum of \$19,000, dated the 25th day of the 6th month, 1923.

The Clerk: Plaintiff's Exhibit 25 into evidence.

(The document referred to was received in evidence and marked Plaintiff's Exhibit No. 25.)

[Note: Plaintiff's Exhibit No. 25 will be found in the Book of Exhibits at page 669.]

Mr. Robinson: I offer into evidence policy of The Phoenix Mutual Life Insurance Company of Hartford, Connecticut—

Mr. Mitchell: There is the number on the back at the top.

Mr. Robinson: —No. 434408, upon the life of Peter L. Ferry, in the sum of \$25,000, under date of June 23, 1923, and attached thereto is an income settlement agreement under date of July 10th—

Mr. Mitchell: Is it attached?

Mr. Robinson: I am offering them under the same exhibit.

Mr. Mitchell: All right.

Mr. Robinson: Income settlement agreement under date of July 10, 1934, with said company and the insured.

Mr. Mitchell: May I suggest that the policy be numbered Exhibit 26 and the income settlement agreement 26-A, 26-A and -B, the first one A and the second one B, so we can differentiate?

The Court: Let the record so show. [118]

The Clerk: All right; 26-A and 26-B, into evidence.

(The documents referred to were received in evidence and marked Plaintiff's Exhibits Nos. 26-A and 26-B.)

[Note: Plaintiff's Exhibits Nos. 26-A and 26-B will be found in the Book of Exhibits at pages 671 and 675.]

Mr. Robinson: I offer into evidence the policy of Metropolitan Life Insurance Company No. 1032329, upon the life of Peter L. Ferry, in the sum of—do you see that amount, Mr. Mitchell?

Mr. Mitchell: Yes; it is right under "Promises to pay" on the first page, "at its home office, New York."

Mr. Robinson: \$6,137, under date of May 28th, 1915.

The Clerk: It will be Plaintiff's Exhibit 27 into evidence.

(The document referred to was received in evidence and marked Plaintiff's Exhibit No. 27.)

[Note: Plaintiff's Exhibit No. 27 will be found in the Book of Exhibits at page 677.]

Mr. Robinson: I offer into evidence Metropolitan Life Insurance Company policy No. 1032491A upon the life of Peter L. Ferry—

Mr. Mitchell: \$6,000.

Mr. Robinson: —in the sum of \$6,000, under date of June 9th, 1915.

The Clerk: Plaintiff's Exhibit 28 into evidence.

Mr. Mitchell: Where did you get that date?

Mr. Robinson: I got that off the page at the very end.
[119]

(The document referred to was received in evidence and marked Plaintiff's Exhibit No. 28.)

[Note: Plaintiff's Exhibit No. 28 will be found in the Book of Exhibits at page 680.]

Mr. Robinson: I offer into evidence Merchants Life Insurance Company policy No. 67233, on the life of Peter L. Ferry, in the sum of \$6,000, under date of April 10th, 1916, included in which is a certificate of assumption executed by the Lincoln National Life Insurance Co. of Fort Wayne, Indiana.

The Clerk: Plaintiff's Exhibit 29 into evidence.

(The document referred to was received in evidence and marked Plaintiff's Exhibit No. 29.) [120]

[Note: Plaintiff's Exhibit No. 29 will be found in the Book of Exhibits at page 684.]

Los Angeles, California, Wednesday, June 2, 1943, 10
a. m.

(Case called and announced ready.)

* * * * *

Mr. Robinson: Mr. Mitchell, do you desire to join with me in offering into evidence the Form 712 of the Treasury Department upon each of the policies of insurance?

Mr. Mitchell: I have no objection whatever to their introduction. You refer to the dividend and premium schedule?

Mr. Robinson: Well, it would be Form 712-Treasury Department, entitled "Life Insurance Statement."

Mr. Mitchell: Oh, no objection.

Mr. Robinson: They were furnished to me by your office.

The Clerk: As one exhibit?

Mr. Robinson: As one exhibit.

The Clerk: Plaintiff's Exhibit 30 into evidence.

(The document referred to was received in evidence and marked Plaintiff's Exhibit No. 30.) [123]

[Note: Plaintiff's Exhibit No. 30 will be found in the Book of Exhibits at page 687.]

Mr. Robinson: At this time I offer into evidence—

The Court: What is Exhibit 30, because I have not seen it? What is it, Mr. Robinson?

Mr. Robinson: It is a statement that is furnished to the government by the respective insurance companies, disclosing the amount of the policies involved, other

descriptive data relative to the policy and the amount that was paid over to the insured.

I offer to stipulate, Mr. Mitchell, that the amount set forth in there as the proceeds of the policies is the identical amount, subject to correction, of course, if error is present, as were included in the gross estate in this matter.

Mr. Mitchell: I assume they are correct, your Honor. I have not checked them with the final determination of the Commissioner, but subject to that checking only, I would so stipulate.

Mr. Robinson: I offer into evidence letter of The Equitable Life Assurance Society, dated May 20, 1943, setting forth the amounts and dates of payment of the premiums on the policy in this estate held by that company.

The Clerk: Plaintiff's Exhibit 31, into evidence.

(The document referred to was received in evidence and marked Plaintiff's Exhibit No. 31.)

[Note: Plaintiff's Exhibit No. 31 will be found in the Book of Exhibits at page 728.]

Mr. Robinson: I likewise offer into evidence a letter of the Phoenix Mutual Life Insurance Company containing the [124] identical data relative to policies of that company.

Mr. Mitchell: That is relative to premiums and dividends?

Mr. Robinson: Premiums and dividends.

The Clerk: Plaintiff's Exhibit 32 into evidence.

(The document referred to was received in evidence and marked Plaintiff's Exhibit No. 32.)

[Note: Plaintiff's Exhibit No. 32 will be found in the Book of Exhibits at page 733.]

Mr. Robinson: I offer into evidence letter dated May 19, 1943, of The Lincoln National Life Insurance Company on Policy No. M67233 with reference to premiums on that policy.

The Clerk: Plaintiff's Exhibit 33 into evidence.

(The document referred to was received in evidence and marked Plaintiff's Exhibit No. 33.)

[Note: Plaintiff's Exhibit No. 33 will be found in the Book of Exhibits at page 734.]

Mr. Robinson: I offer into evidence letter dated May 24, 1943, of The Prudential Insurance Company of America relative to the same data.

The Clerk: Plaintiff's Exhibit 34 into evidence.

(The document referred to was received in evidence and marked Plaintiff's Exhibit No. 34.)

[Note: Plaintiff's Exhibit No. 34 will be found in the Book of Exhibits at page 735.]

Mr. Robinson: I offer into evidence statement of Pacific Mutual Life Insurance Company on policy No. 509810 relative to the same matter.

The Clerk: Plaintiff's Exhibit 35 into evidence.

(The document referred to was received in evidence and marked Plaintiff's Exhibit No. 35.) [125]

[Note: Plaintiff's Exhibit No. 35 will be found in the Book of Exhibits at page 737.]

Mr. Robinson: I offer into evidence five statements of The Provident Life and Trust Company of Philadelphia relative to policies with that company involved in this matter.

The Clerk: Plaintiff's Exhibit 36 into evidence.

(The document referred to was received in evidence and marked Plaintiff's Exhibit No. 36.)

[Note: Plaintiff's Exhibit No. 36 will be found in the Book of Exhibits at page 738.]

Mr. Robinson: I offer into evidence a letter dated May 25, 1943, from Knights of Columbus, together with "Charter Constitution Laws" of the Knights of Columbus for the year 1942.

The Clerk: Plaintiff's Exhibit 37 into evidence.

(The document referred to was received in evidence and marked Plaintiff's Exhibit No. 37.)

Mr. Robinson: I will call Mr. Ferry to the stand.

JAMES L. FERRY,

recalled as a witness by and on behalf of Plaintiff, having been previously sworn, was examined and testified further as follows:

Further Direct Examination

By Mr. Robinson:

Mr. Mitchell: I think a statement, perhaps, should be made in respect of Exhibits 31 through 37. Exhibits 31 through 36 show the amount of dividends paid, the amount of premiums and the amount of dividends that were used and credited on premiums, leaving a smaller amount of cash paid by the insured and the dividends accrued credited for the balance of premium. [126]

(Testimony of James L. Ferry)

Exhibit 37 is for the purpose, is it not, Mr. Robinson, of establishing the dates and amounts of premiums paid?

Mr. Robinson: And I assume you will stipulate with me that the premiums were paid in accordance with the terms of the policies?

Mr. Mitchell: Well, I will stipulate that the benefits were paid up on death, the death benefits, and the court can draw his own conclusions as to whether he was in default on the premiums. I don't know.

Mr. Robinson: We have not received, I might state at this time, a statement of premiums and dividends on the policy with the Metropolitan Life Insurance Company. By reference I would like to offer into evidence at this time that statement, with the understanding and stipulation that when it does arrive it may be put into evidence.

Mr. Mitchell: Statement relative to premiums and dividends?

Mr. Robinson: Yes; of the Metropolitan Life Insurance Company.

Mr. Mitchell: Yes. No objection to the offer.

Q. By Mr. Robinson: You were sworn yesterday, were you not, Mr. Ferry? A. Yes.

Q. Are you familiar with the custom and practice of your father in carrying on his business and investments and [127] the purchase and sale of securities and in buying and selling real property and business ventures?

A. I am fairly well familiar with it; yes.

Q. In connection with the buying and selling of real property and making of investments, and in relation to any capital transactions relative to properties controlled by Mr. Ferry or your mother, did your father have any practice or custom in dealing with those, as to whether he

(Testimony of James L. Ferry)

dealt on his own initiative, or did he receive or ask the consent of any other individual?

Mr. Mitchell: Just a minute. That question is pretty broad and I do not think the witness has qualified himself to testify as to every business dealing that his father had over a period of 25 years or 20 years. I think that the time should be limited to what is involved in this case.

The Court: To his own personal knowledge.

Mr. Mitchell: The witness was a mere child 25 years ago. He has not testified that he was present during all of the decedent's business transactions. I do not believe he is qualified to answer that question. If counsel wants to ask him concerning some specific transaction it would be more definite.

The Court: Limited to your own personal knowledge, and fix the incidents, Mr. Ferry.

A. Well, there was one deal that I remember him talking it over with my mother before he made. [128]

Q. By Mr. Robinson: What deal was that?

A. That was when he bought some additional land at the ranch.

Q. Additional land at the ranch. Where is the ranch?

A. It is located in Fresno County.

Q. What time or what year was that, about?

A. It was in 1932.

Q. Do you recall what land he bought at that time?

A. Well, there was two sections. I think it was Section 12 and Section 2.

Q. Are those the same sections that are involved in Trust 6204? A. Yes; they are in the trust.

Q. Tell us regarding that transaction.

(Testimony of James L. Ferry)

Mr. Mitchell: Just a minute. I object to the question on the ground that the trust was created in 1925. If this evidence is to establish a property settlement agreement between the spouses in 1925, any evidence as to something that took place in 1932 would not be relevant.

Mr. Robinson: He has testified that these two sections of land are a portion of the corpus of the trust. The taxability of that trust is a matter that is in issue here.

Mr. Mitchell: I believe the trust was created in 1931, and the complaint and refund claim are based entirely upon an agreement made by conduct of the parties in creating the trust, not in acquiring property at any time but in [129] creating the trust out of old type of community property in which the wife had a mere expectancy. That property was transformed into some type of co-ownership wherein the wife had a present interest, whether it was a joint tenancy in common or just what it was. At the time of the creation of the trust it was transformed, or the property settlement agreement was made with the wife. Now, four of those trusts—five of them, in fact, were created in 1925; one was created in 1930. Any conversation that took place regarding the acquisition of property in 1932 would not tend to prove any such property settlement agreement between the spouses; and if they are intended as declarations—I don't know what the conversation was, of course—but if they are introduced as declarations to establish a contract entered into in 1925 or '31, the government objects because they would be, of course, self-serving declarations.

Mr. Robinson: We are contending that the issue involved in this particular matter relative to these trusts is

(Testimony of James L. Ferry)

whether one-half or all of the trusts are includable in the gross estate, irrespective or whether there was a property settlement agreement or not. If we can show that the property that went into the trusts belonged in any part to Mrs. Ferry, that portion should be excluded from the gross estate.

The Court: I will permit the evidence. Proceed.

Mr. Robinson: Proceed.

Mr. Mitchell: I did not hear the court. [130]

The Court: I will permit the evidence.

A. Well, we drove to Fresno, that is, myself and my father and mother, and we looked over the land; and my father asked my mother whether they should have additional land there at the ranch to work in with what they already had; whether they had enough or whether they should acquire more. And they talked that over and my father told my mother that she had as much to lose as he had by going into debt or spending more money buying this additional land. So they decided to buy it and put it in the trust.

Mr. Mitchell: I move that the last answer be stricken as a conclusion of the witness, what they decided.

The Court: That may go out, the conclusion of the witness.

Q. By Mr. Robinson: And which two sections of land were bought?

A. That was section 2 and section 12.

Q. Was there any mention made in the conversation as to the ownership of the property or as to the consideration therefor? A. No; not that I remember of.

Q. Calling your attention to a conversation that you had with your father—

(Testimony of James L. Ferry)

Mr. Mitchell: Just a minute. I move that the whole answer now be stricken on the ground that it does not tend to establish any issue in this case. [131]

Mr. Robinson: It showed the acquisition of property in the trust, and it shows that the mother had as much to lose as the father by the transaction.

The Court: It does not seem that it has very much probative effect. However, I will let it stand.

Q. By Mr. Robinson: Did you have any conversation with your father shortly before the time you were married? A. Yes; I did.

Q. When did that conversation take place, about?

The Court: You went into that yesterday, counsel.

Mr. Robinson: Not this conversation. This was before he was married.

The Court: Yes; he went into it yesterday. He told him he wanted to get married and wanted to get into business for himself, and then his father and mother made this deal with him.

Mr. Robinson: I am not referring to that particular conversation.

The Court: Was he married more than once?

The Witness: No, your Honor.

Mr. Robinson: No; I think only once. Apparently they had a lot of conversations.

The Court: All right.

A. Yes. It took place one day in May of '32, when I was driving my father—

Q. By Mr. Robinson: When were you married?

[132] A. In April, '32.

(Testimony of James L. Ferry)

Q. In other words, it was after you were married, then?

A. No; it was a month before, or June. I beg your pardon. It was in June.

The Court: What was in June, your marriage or the conversation?

The Witness: No. I was married in April.

Q. By Mr. Robinson: April, 1932. And when did the conversation take place.

A. In March, the month before.

Q. The month before you were married?

A. That is right; the month before.

Q. And where did the conversation take place?

A. We were on our way from Glendale to the ranch in Fresno.

Q. Who were present?

A. Just my father and myself.

Mr. Mitchell: Were you driving or on the train?

A. No; I was driving the car. I was driving to the ranch.

Q. By Mr. Robinson: What was that conversation?

A. Well, we were talking about—

Mr. Mitchell: Just a minute. I object to that question, to what will undoubtedly, as the last one, bring out a self-serving declaration by the decedent which is wholly inadmissible [133] to establish contract.

Mr. Robinson: I believe it will bring out a declaration of the decedent which is admissible in evidence.

Mr. Mitchell: Not where the estate is offering the evidence. I don't think that counsel would attempt to bring out evidence that is against the interests of the

(Testimony of James L. Ferry)

estate. That would be quite unusual. I don't know what the answer is going to be but—

The Court: Let us find out what it is going to be. Proceed.

Q. By Mr. Robinson: Tell the conversation. [134]

* * * * *

JAMES L. FERRY,

recalled as a witness on behalf of the plaintiff, having been previously sworn, was examined and testified further as follows:

Mr. Mitchell: Were you through with the direct examination, Mr. Robinson?

Mr. Robinson: Yes.

Cross-Examination

By Mr. Mitchell:

Q. Mr. Ferry, I call your attention to Plaintiff's Exhibit 5, written on the stationery of "Peter L. Ferry, General Contractor, Glendale," dated September 29, 1931, and I will ask you who typed that? Did you type it?

A. No; I didn't. I think Mr. Irke typed it.

Q. Who was he?

A. He was a bookkeeper at that time. I think he is the one that typed it.

Q. Did you dictate it or did your father dictate it?

A. My father dictated it.

Q. Did he say anything about the reason he did not put Mrs. Ferry's name in at the top as one of the parties of the first part?

A. No; he didn't.

(Testimony of James L. Ferry)

Q. At the time this was executed—I am still [172] referring to Exhibit 5—you took over the property, of course?

A. Not the real estate; no.

Q. No, no, no. I mean the equipment business was sold to you and the business, the going concern?

A. Yes; that is right.

Q. What did that consist of, Mr. Ferry?

A. It consisted of a lot of road machinery and equipment.

Q. Had he been renting that to contractors?

A. Yes; that is right.

Q. For rentals? And you continued in that same business from then on?

A. That is right.

Q. Why did he ask that his name be in the business after you took over as Peter L. Ferry & Son?

A. Well, Peter L. Ferry, the name of Peter L. Ferry was well known in the contracting business and I was the one that asked him to use that name, because it was a familiar name in the industry.

Q. I see. The good will was attached to the name?

A. And good will was attached to it.

Q. Mr. Ferry, how long had he been operating that business as a rental business, equipment rental business, when you took over, how long before?

A. Before I took over? [173]

Q. Yes.

A. Oh, he always did operate an equipment rental business along with his contracting business. He always had surplus equipment that, when he was not using it on his contracts, he would rent to other contractors. He always did do that along with his contracting.

(Testimony of James L. Ferry)

Q. I had better ask: When did he cease the contracting end of the business?

A. I think his last contract was about in 1929.

Q. About 1929?

A. That is, his last—yes; I would say that would be his last contract job.

Q. Now, calling your attention to Exhibit 6, also dated September 29, 1931, reading as follows: "Lease to Cover Lots No. 1 to 9, inclusive, in Tract No. 6699, except Warehouse and Garage and enough room for Jack Isbell for his building material business." Who was the lessor under that lease and who was the lessee?

A. Under Isbell's lease?

Q. Under the lease referred to here, the lease covering Lots 1 to 9, inclusive, of Tract No. 6699?

A. Well, my father was the—he was the lessor. My father and mother were the lessors on it. Isbell was a tenant.

Q. Oh, I see. How long was that lease, for what period of time? [174]

A. I don't know how long the lease was for, whether it was just from month to month, is the way that they were operating the lease.

Q. Did you ever see that lease?

A. I never seen the lease; no.

Q. How do you know your mother was one of the lessors?

A. Well, she was in with dad on all the property, I know.

Q. What do you mean by "in all on all the property"?

A. Well, she had an interest in all his property. You see, he owned quite a bit of property around Glendale.

(Testimony of James L. Ferry)

Q. Are you speaking from the deeds which you saw?

A. No, no.

Mr. Mitchell: I move that the witness' answer be stricken as a conclusion.

The Court: It may go out.

Mr. Mitchell: The deeds are the best evidence.

Q. Why was any reference made to this lease on Lots 1 to 9 in your agreement with your father?

A. Well, that was the property which we operated the business on. Our yard and offices were located on that property.

Q. You are sure that did not belong to Trust 1080, aren't you?

A. Yes; I am sure it didn't belong to it, that is, [175] the title was held—the title to the lease was held in Trust 1080.

Q. Legal title was in Trust 1080? A. Yes.

Q. And you are sure, then, that the owner of the legal title was not the lessor?

A. You mean not my father, who would be the lessor?

Q. No. You just say that the legal title was in the trust company. What is that, Title Guarantee and Trust, 1080? A. No; that is the Citizens.

Q. The Citizens. Legal title was in the Citizens, I believe you say, is that right?

A. Yes; that is right, but under that trust my father and mother had rights to operate all the property.

Mr. Mitchell: I move that that answer be stricken. The trust itself is the best evidence of what rights the father and mother had.

The Court: It may go out.

(Testimony of James L. Ferry)

Mr. Mitchell: What rights the spouses had, and the trust is attached to the stipulation of facts and does not indicate any rights at all, except a one-tenth interest owned by Mr. and Mrs. Ferry as joint tenants.

Q. Would you like to refresh your memory on that, Mr. Ferry, as to your father's and mother's rights, from the trust instrument itself? [176] A. No, no.

Q. You recall that they had a one-tenth interest as joint tenants, do you?

A. No. I don't recall what interest they had in that particular trust.

Q. This exhibit 6 goes on to say: "All taxes on land to be paid by Peter L. Ferry, known as party of the first part." Why wasn't Mrs. Ferry's name put in there, or did Mr. Ferry tell you? A. He didn't tell me; no.

Q. The exhibit goes on: "All taxes on equipment to be paid by James L. Ferry, known as party of the second part." Then the next paragraph: "Party of the first part agrees to re-locate the office buiding after condemnations are completed for Phyllis Avenue." Were condemnation proceedings pending at that time?

A. That is right.

Q. By the City of Glendale?

A. By the City of Los Angeles.

Q. The City of Los Angeles. Was this office in Los Angeles or in Glendale? A. It was in Los Angeles.

Q. On San Fernando?

A. Yes. Well, at that time there was no San Fernando Road, at that time.

Q. Now, the exhibit goes on: Rental to be \$150.00 [177] per month and to run for a period of five years, rental payable in advance on the first of each month." It

(Testimony of James L. Ferry)

does not indicate who is to pay that rent or to whom that rent is to be paid. Can you explain that clause?

A. Yes. I was to pay that rent to my father and mother.

Q. In other words, you were renting something, then, yourself; you were the lessee, is that the idea? Is this intended as a lease, this exhibit 6?

A. Well, I don't know if you would call it a lease. It was just more of writing down our agreement that we had.

Q. Isn't it a fact that your father leased this property from the Citizens Trust and Savings Bank, Trustee, under Trust No. 1080? A. No.

Q. He did not. The bank had legal title but he was the lessor, is that the idea?

A. Well, I don't know about that; no.

Q. Was the lease executed to you, other than this document? A. No.

Q. Exhibit 6? A. No.

Q. Now, I call your attention to a document dated October 1, 1931, that is two days after the dates appearing on Exhibits 5 and 6, and entitled, "Agreement for the Sale [178] of Road-building Equipment." That is a different purchase from the one referred to in Exhibit 5. or is it? Is that correct?

A. How was that again, now?

Q. Exhibit 5, first party, Peter Ferry, agrees to sell to second party, James Ferry, all of the Road Building Equipment, as per inventory, and which is made a part of this agreement. That is Exhibit 5. Exhibit 6—Exhibit 7, rather, recites: "Party of the first part"—that's Peter Ferry—"agrees to sell and party of the second

(Testimony of James L. Ferry)

part"—James Ferry—"agrees to buy all of the Road Building Equipment as per inventory, and which is made a part of this agreement". The consideration is the same in each case, \$10,000.

A. This agreement here was written—

Q. Exhibit 7 was written. A. —before.

Q. Exhibit 5.

A. 5 is right. This here was the first paper that we drew up, just the day I talked to my father about it.

Q. And here was the—

A. And how that date got on top there—that is in my father's handwriting.

Q. How he put that "Oct. 1" on there I don't know. But this was just a memorandum, what we drew this one here from. [179]

Q. Why didn't your mother sign the first one here, Exhibit 7?

A. Well, this was just a memorandum that he wrote up first, that my father and myself talked over before we talked to my mother about it. Then this one was written up afterwards, this Exhibit 5.

Q. Oh, by the way, you testified as to a conversation you had with your father on September 29th, about the time that the Exhibits 5 and 6 were executed. He said nothing then about a property settlement agreement between him and your mother of 1925, at that time, did he?

A. The settlement they had at 1925?

Q. Yes; at the time of the trust agreement.

A. No.

Q. You are sure that the legal title to the property upon which the business was conducted was held by

(Testimony of James L. Ferry)

Citizens Trust and Savings Bank, as Trustee, under Trust 1080? A. As far as I know; yes.

Mr. Mitchell: If the court please, certain checks drawn on The First National Bank of Glendale and signed "Peter L. Ferry & Son," and one "Peter L. Ferry" and numbered herein.

The Court: Printed. There were none signed "Peter L. Ferry & Son".

Mr. Mitchell: By "James Ferry."

The Court: Yes; printed "Peter L. Ferry & Son."
[180]

Mr. Mitchell: "Peter L. Ferry & Son" by James Ferry, signed by James Ferry.

The Court: That is right. The only writing was "James L. Ferry." The other was printed.

Mr. Mitchell: And the other was signed "Peter L. Ferry & Son, by Peter L. Ferry." Those checks were numbered Exhibits 8, 9, 10, 11 and 12, I believe. Preliminary to the introduction of those checks the witness was asked certain questions that had a bearing on the question of the ownership of that contracting equipment and renting business. I objected to that testimony on the ground that if it was intended thereby to establish the ownership of premiums used to pay for life insurance, separate ownership by Mrs. Ferry, we objected to it on the ground that the question of the separate ownership of premiums was not supported by the refund claim. Counsel then announced that the purpose of the testimony was to affirm, show an affirmation or corroboration of a property settlement agreement. It thereafter developed that that testimony would tend also, if so intended by

(Testimony of James L. Ferry)

counsel, to support the co-ownership of the purchase price paid by the purchaser, the son James, the co-ownership, separate co-ownership by the spouses. The checks indicate that that purchase price was used to pay life insurance premiums.

I now move that all of that testimony be stricken in so far as it may tend to establish a separate co-ownership [181] of this particular fund, to-wit, receipts from the sale of the equipment renting business, because, as the testimony develops, it was preliminary to the introduction of checks which counsel will contend were owned 50-50 by the spouses; that therefore, since the wife paid half of the premium out of her separate half ownership, the proceeds of the policies attributable to such payments are excludable from the gross estate. Our objection is the same objection that has been made heretofore to the effect that the refund claim does not support such a pretension, neither does the estate tax return, and neither does it appear that this evidence was before the Commissioner at the time he considered the refund claim—very essential evidence. If it were not essential, counsel would not offer it at this time. The Commissioner was not given an opportunity to investigate these matters; and the rule that the Commissioner must be given all of the detailed facts is a salutary rule. It is intended to prevent multiplicity of suits and congestion of calendars of District Courts, and grave claims where refund suits are commenced and tried.

In so far as the testimony, therefore, given by this witness concerning a statement, a self-serving declaration made by his father at the time of this sale in 1931, it is not only inadmissible because it is self-serving, but also

(Testimony of James L. Ferry)

because it tends to support something other than the grounds and detailed facts stated in the refund claim. [182]

If, on the other hand, it is limited to proving a contract, then the only objection we have to it is that it is self-serving. If it is actually offered, as counsel said it was, to establish a property settlement agreement made six years before, then our only objection is that it is self-serving. But I move now that that testimony concerning the conversation of his father and relating to an alleged co-ownership between the two spouses be stricken.

I also move that the checks, Exhibits 8, 9, 10, 11 and 12, be stricken because they are not supported by the refund claim; they do not establish community co-ownership at all, and that is the ground of the refund claim and the estate tax return. And, in addition to that, in support of our motion to strike those exhibits, those checks, is this: —I will withdraw that.

Those, I think, complete our objection and our motion and the grounds of our motion. [183]

* * * * *

The Court: Yes.

So I will allow an exception to the Government and permit the testimony to be introduced.

Q. By Mr. Mitchell: When you made out these checks to which we have just been referring, Exhibits 8, 9, 10, 11 and [211] 12, how did you know the amount to be filled in?

A. I received a statement, that is, a premium statement from the insurance companies that I made the amount on.

(Testimony of James L. Ferry)

Q. Addressed to whom?

A. Addressed to my father.

Q. At the place of business?

A. Well, most of our mail came to the house at that time.

Q. And he authorized you to open his mail from insurance companies and pay the premiums?

A. Yes.

Q. You did that before 1931, too, didn't you?

A. Not before '31; no.

Q. How long after 1931 did you do that?

A. Oh, I did it right up to '35, until the time of his death.

Q. And the checks were all drawn on the account of Peter L. Ferry & Son in the First National?

A. Not all of them; no. I didn't pay all the insurance premiums.

Q. Oh, he paid some of them himself?

A. He paid some of them himself; yes.

Q. In the case of those which he paid where would the notice be addressed?

A. They would be addressed to his home.

Q. To him personally? [212] A. Yes.

Q. At home. And did you open those, too?

A. Yes. I opened all his mail.

Q. How did you know which ones to pay and which not to pay? A. Well, he would generally tell me.

Q. He told you when he wanted you to pay it out of the Peter L. Ferry & Son account?

A. Yes; and if he was out of town I would go ahead and pay them.

Q. Out of that account? A. Yes.

(Testimony of James L. Ferry)

Q. Was that a joint tenancy account?

The Court: Now, just a moment. That is an improper question, Mr. Mitchell, to ask a lay witness, a legal question.

Q. By Mr. Mitchell: Well, did you sign a joint tenancy contract with your father when that account was opened?

Mr. Robinson: May I ask a question on voir dire?

The Court: Yes.

Q. By Mr. Robinson: Do you know what a joint tenancy account is?

A. Oh, it is where two people have equal right in the account.

Q. Is that all you know about it? [213]

A. That is all.

Mr. Robinson: I object to the question.

The Court: Just develop the facts, Mr. Mitchell, without asking a legal question to be answered. Some lawyers could not answer that question.

Mr. Mitchell: The complaint and protest, and so on, are so full of the words "joint tenancy account" that I assumed the witness knew. I made a mistake probably.

Q. Are you married, Mr. Ferry?

A. Yes; I am.

Q. Do you own any property with your wife as joint tenant? A. Yes; I do.

Q. Isn't it a fact that you hold that property in joint tenancy so that in case you die it will all revert to her, all go to her without probate?

Mr. Robinson: I object to the question as incompetent, irrelevant and immaterial, and outside of the scope of the issues of this case.

(Testimony of James F. Ferry)

The Court: Well, I will permit it.

Mr. Mitchell: Will you kindly read the question, Mr. Reporter?

(Question read by the reporter.)

Mr. Mitchell: I mean the time and expense of probate.

A. Are you talking about real property like real estate? [214]

Q. Any property held in joint tenancy, real estate or personal property or bank accounts or anything else.

A. Well, I have no real estate.

Q. Can you answer the question?

The Witness: Will you read that question again to me please?

(Question again read by the reporter.)

A. No; I wouldn't say so. No.

* * * * *

Q. By Mr. Mitchell: Mr. Ferry, I call your attention to page 16 of Plaintiff's Exhibit 2.

Is that for identification or in evidence?

The Clerk: That is still for identification according to my records.

Mr. Mitchell: Do you want to introduce that?

Mr. Robinson: What is that?

Mr. Mitchell: The estate tax return.

Mr. Robinson: I wanted that in.

Mr. Mitchell: Will you stipulate that this can be marked now as an exhibit? [215]

(Testimony of James L. Ferry)

Mr. Robinson: I will so stipulate.

The Clerk: Plaintiff's Exhibit No. 2 admitted into evidence.

(The document referred to was marked Plaintiff's Exhibit No. 2, and was received in evidence.)

[Note: Plaintiff's Exhibit No. 2 will be found in the Book of Exhibits at page 562.]

Mr. Robinson: I do not believe that is a true and correct copy there. I think we agreed that there were certain matters that had been omitted.

Mr. Mitchell: There are blank pages of exhibits, counsel, and some exhibits attached that are attached to the stipulation of facts.

Q. I call your attention to the page numbered A-16 in the lower right-hand corner, to the top of the page, entitled "Schedule D-1 Jointly Owned Property." The first item, Item 1, is "National Bank of Glendale, Commercial Account, in name of Peter L. Ferry & Son" and the amount returned is \$3,140.70. Is that particular account, the one in "Peter L. Ferry & Son" the one that you drew these checks on?

The Court: Is the date shown there, Mr. Mitchell, of that account?

Mr. Mitchell: I am reading from the—

The Court: Is there any date shown for the account, the date of it?

Mr. Mitchell: No, your Honor. It is the balance that was in the account at the date of death, reported as joint [216] tenancy property under the joint tenancy schedule.

(Testimony of James F. Ferry)

The Court: That is what I wanted to know.

A. I couldn't tell you if that was the exact account.

Q. By Mr. Mitchell: How many accounts did Mr. Ferry have in that bank, held in the name "Peter Ferry & Son"?

A. There was only one account that I know of.

Q. That continued until the time of his death?

A. That is right.

Q. And commenced in '31 when you bought the equipment business? A. That is right.

Q. Do you recall discussing a number of matters in connection with the estate tax return with a Mr. Eddy, a revenue agent, Nat M. Eddy?

A. I don't remember him by that name. I remember talking to an agent.

Q. You did talk to a revenue agent? A. Yes.

Q. About shortly either in December, '36, or early part of January of 1937?

A. Oh, I couldn't say as to the dates; no.

Q. Where did you talk to him, at your place of business? A. Yes; at the place of business.

Q. Did you tell him that this account in the First National Bank of Glendale standing in the name of Peter L. [217] Ferry & Son was a continuation of your father's old business account?

A. Not that I remember; no.

Q. Did you tell him that you were made a joint tenant in that account on January 19, 1934?

A. Not that I remember of; no.

Q. What funds were deposited in that account?

A. Funds from the business.

(Testimony of James F. Ferry)

Q. From your business?

A. From my business; yes.

Q. And what other sources, what other funds, if any?

A. That is all that I remember of now.

Q. Did your father make any deposits between '31 and the time of his death?

A. He could have, yes; but I don't recall any in particular.

Q. Have you your bank book covering that account?

A. No; I haven't got the bank book.

Q. Do you still carry that account in the same name?

A. I still carry it in the same name.

Q. In the same bank? A. In the same bank.

Q. How far back does the book you now have go?

A. Oh, I imagine it goes back three or four years.

Q. What did you do with the pass-books prior to that time? [218]

A. I don't know what happened to them; lost some way or other.

Q. Did you have them or did he have them?

A. No; I always had them.

Q. You mean after 1931? A. Yes.

Q. He had them before that, didn't he?

A. He had them before '31; yes.

Q. In what name was the account carried before 1931? A. Peter L. Ferry.

Q. You do not recall you and your father signing a joint tenancy contract with the bank on January 19, 1934, in respect of that account?

Mr. Robinson: I object to the question. There has not been a proper foundation laid to show that this man is

(Testimony of James L. Ferry)

qualified to answer what is a joint tenancy account and what is not.

Mr. Mitchell: If the court please, it is a matter of common knowledge. Laymen know that banks require them to sign a contract in respect of joint tenancy which they want to create with the bank. The bank insists upon it. It is very common.

The Court: Yes. But the effect of it, Mr. Mitchell. They may have stricken out words in it. You know that.

Mr. Mitchell: I am not asking the contents of any such account in the bank, but whether any such card was signed by [219] him and his father. I won't call it "a joint tenancy account."

The Court: All right.

Q. By Mr. Mitchell: I will ask you whether you signed any contract card, a printed form or typed form furnished by the First National Bank of Glendale, on or about the 19th day of January, 1934, which was also signed by your father on or about the same date.

A. Yes.

Q. Relative to—you did?

A. Selecting a date, I couldn't swear to the date; but I remember of signing a card along with my father so he could use the bank account.

Q. And when was that card signed, what year, then, if you can't remember the exact date or month?

A. I can't even remember the year; but I know we did sign a card together.

Q. You did not, then, tell Mr. Eddy during this conversation, or this revenue agent, that you had changed this account—that this account had been changed to a joint

(Testimony of James L. Ferry)

tenancy account on January 19, 1934? You did not make such a statement to Mr. Eddy?

A. No; not that I remember of.

Q. Do you recall that Mr. Eddy asked you at that time, during that same conversation, whether or not you had made any deposits in that account yourself? [220]

A. I don't recall of him asking me the question; no.

Q. And do you recall that you answered "No" in answer to that question?

A. I don't recall the question at all.

Q. After 1929, when your father ceased the contracting business and only handled rental equipment, didn't he spend most of his time up at Fresno on the ranch?

A. He spent a good deal of his time on the ranch; yes.

Q. Did you, when he was at the ranch prior to 1931, run his rental equipment business for him?

A. Well, I didn't run it for him. I worked for him there.

Q. Did he pay you a salary?

A. He paid me a salary; yes.

Q. How long did you work for him prior to 1931?

A. Oh, I started in 1929.

Q. Oh, not until 1929. How old were you then, Mr. Ferry?

A. I was about 30.

Q. What had you been doing prior to that time?

A. I was going to school.

Q. Until you were 30?

A. I made a mistake. I was about 29.

Q. 29. You don't mean 19, do you?

A. What?

Q. You don't mean 19? [221]

A. Yes; I guess I was 19.

(Testimony of James L. Ferry)

Q. I call your attention to items 2 and 3, two other jointly owned accounts with two other banks—no; the same bank.

“Item 2. First National Bank of Glendale”—

The Court: What exhibit are you referring to?

Mr. Mitchell: I am still referring to the estate tax return, Plaintiff's Exhibit 2.

Q. “First National Bank of Glendale, Savings Account, in name of Peter L. Ferry Ranch”; and the third item:

“First National Bank of Glendale, Commercial Account, in name of Mr. and Mrs. P. L. Ferry.”

Do you know whether your father prior to that time had any other accounts in the First National Bank of Glendale besides these three? A. No.

Q. Those were the only three?

A. The only three that I know of.

Q. Do you recall, Mr. Eddy discussing those two accounts with you, also, at the time?

A. No; I can't recall that either.

Q. Do you recall telling him at that time that the Item 2, the joint savings account, was an account with him and his son-in-law, F. C. Diener—is that the way it is pronounced, Diener? [222] A. Diener; yes.

Q. Do you recall that conversation with Mr. Eddy?

A. No; I can't recall that conversation either. No.

Q. Do you recall telling him at that time that all of the funds in that account were moneys of the decedent?

A. No; I don't recall that either.

Q. Moneys of your father, I mean? A. No.

(Testimony of James L. Ferry)

Q. Now, item 3: the joint account between your father and mother in the same bank with a balance of \$28.59. Do you recall telling him regarding that account that all of the money in that account was contributed by your father? A. No; I don't recall that either.

Q. Do you know why you are not claiming—I mean your mother is not claiming that only half those accounts were includable in the gross estate?

Mr. Robinson: I object to the question as incompetent, irrelevant and immaterial so far as this witness is concerned.

The Court: Sustained.

Mr. Robinson: No foundation laid and he is not any party to this matter.

The Court: Sustained as to why his mother is not doing something. [223]

* * * * *

Q. You paid rent, didn't you, to Trust 1050 for the property you occupied? A. No.

Q. However, the legal title, I believe you said, was in the trust?

A. As far as I know it was in the trust; yes. But I [225] didn't pay rent to the trust.

Q. You don't know why you were permitted to occupy that property, on what theory?

A. Well, on this agreement that I had with my father and mother.

Q. I mean how did the Trust Company happen to permit you to occupy that property without rent?

* * * * *

(Testimony of James L. Ferry)

A. Well, in the trust my father always managed the property in the trust, he always collected the rents.

Q. By Mr. Mitchell: For all the property in the trust?

A. For all the properties, yes; and that money never went to the bank. He always kept that money himself.

Q. The rents which he collected?

A. Yes; that is right.

Q. You don't know what the deal was between your father and the bank in that connection?

A. No.

Q. What the agreement was, of course. Was your father a director, or did I ask you that question, of the [226] First National Bank of Glendale?

A. Yes; he was.

Q. And he owned other stock besides the 476 which he transferred to Peter?

A. Well, now, I couldn't say that because I don't know.

* * * * *

Redirect Examination

By Mr. Robinson: [227]

* * * * *

Q. Calling your attention to that Exhibit 6, under which you rented from your mother and father that certain piece of property, the rent that was called for therein, were those rental payments made?

A. Yes; they were made, that is, they were made on the books. They were just given credit.

Q. You credited your father and your mother in the books?

A. That is right.

Q. And what were those amounts each month, do you know?

A. It was \$150 a month.

(Testimony of James L. Ferry)

Q. The same amount as before?

A. The same amount that is on that agreement there.

Q. This Peter L. Ferry & Son account that was opened in 1931, who opened that account? A. I did.

Q. And from the period from 1931 through 1935 who made the deposits in that account?

A. I generally made the deposits in the account. [228]

Mr. Robinson: That is all.

Recross-Examination

By Mr. Mitchell:

Mr. Mitchell: One question I intended to ask and forgot, instead of recalling him as an adverse witness.

Mr. Robinson: Yes. I might state to the court that Mr. Ferry is leaving tonight by plane.

Mr. Mitchell: Leaving town?

Mr. Robinson: Leaving town.

Mr. Mitchell: All right.

Q. During this conversation with your father at the time you purchased the equipment business, he did not say anything to you about having made a property settlement agreement with your mother in 1925, did he?

A. No; he didn't mention it.

Q. He did not say anything about having made a property settlement agreement with your mother in 1930, did he?

A. No; not those particular dates. No.

Q. Or any other date; he never referred to it?

A. Well, yes; he told me. He says, when they were first married, he says, they entered into an agreement that they would go 50-50 on everything; and that is the only time that he mentioned that. [229]

CATHERINE B. FERRY,

the plaintiff herein, being first duly sworn, was examined and testified as follows:

The Clerk: Your full name?

The Witness: Catherine B. Ferry.

Direct Examination

By Mr. Robinson:

Q. You are the wife of Peter L. Ferry who is now deceased? A. Yes.

Q. You are the plaintiff in this matter?

A. Yes.

Q. You are the plaintiff in this matter?

A. Yes.

Q. When were you married?

A. January 31, 1906.

Q. January 31, 1906. And where were you married?

A. At Steubenville, Ohio.

Q. And you married Mr. Ferry there? A. Yes.

Q. And from that time up to the day of Mr. Ferry's death you were husband and wife during all that time?

[230] A. Yes.

Q. When did you come to California?

A. In 1909.

Q. Do you remember what time of the year?

A. About the 1st of November.

Q. In 1909? A. Yes.

Q. And from that time, November 1, 1909, the date of Mr. Ferry's death, were you and Mr. Ferry continually during that time residents of the State of California?

A. Yes.

Q. And of the County of Los Angeles?

A. Yes.

(Testimony of Catherine B. Ferry)

Q. How much was Mr. Ferry worth at the time you married him, if you know?

A. Oh, I would say a few hundred dollars.

Q. Just a few hundred dollars. Was he employed?

A. Yes; he was employed by his father.

Q. How much was he worth when he came to California, if you know?

A. Oh, around \$14,000 or \$15,000, I think.

Mr. Mitchell: A little louder. I can't quite hear.

A. About \$14,000.

Q. By Mr. Robinson: Is there any particular document or fact that prompts you to remember that figure?

A. Yes. I left it in my purse. [231]

(Counsel handing purse to the witness, who produces memorandum and hands to counsel.)

Q. You have shown me, Mrs. Ferry, a letter dated October 13, 1909, on the stationery of Jas. Ferry & Sons, General Contractors in Crafton, Pennsylvania, and the agreement is to settle the accounts of the parties interested therein—of the partners interested—they are the parties interested therein. It does not refer to them as "partners." And it states here that the total amount that Peter L. Ferry is to receive is \$14,654.47, and it is from that figure that you base your recollection, is that right? That is all Mr. Ferry had when he came to California?

A. Yes; that was all.

Q. And it was following the dissolution of that business there that he came?

A. Yes.

Q. At the time of Mr. Ferry's death on June 16, 1935, was there any property that was owned by you or Mr. Ferry or both of you that was not taxed and in-

(Testimony of Catherine B. Ferry)

cluded in the gross estate by the Commissioner in this matter? A. No; there was not.

Mr. Mitchell: Oh, now, I object that the records speak for themselves.

Mr. Robinson: They do not speak as to her property.

Mr. Mitchell: Oh, you mean her property tax?

Mr. Robinson: I am bringing out that everything that [232] they had, and the question read: "Either Mr. Ferry or Mrs. Ferry or both of them" were taxed by the Government. That was all that I was bringing out.

Mr. Mitchell: May I have that question and answer?

(Record read by the reporter as requested.)

Mr. Mitchell: Now, I did not have time to object to that. That is a very broad question and I do not believe this witness is qualified to answer that question.

The Court: You can ask it another way, counsel. Ask the witness if she knows of any property that was not included.

Q. By Mr. Robinson: Do you know of any property of yourself or Mr. Ferry or both of you that was not included by the Commissioner in the gross estate herein and taxed? A. No; I don't.

The Court: That is proper that way, because she might not have been able to answer it the other way.

Q. By Mr. Robinson: Did you ever inherit any property during your lifetime? A. No; I didn't.

Q. And by "property" I mean real estate or cash or personal property or any assets? A. Nothing.

Q. Did Mr. Ferry ever inherit any property?

A. No; he didn't.

Q. Did you ever receive any property by gift from [233] anyone? A. No.

(Testimony of Catherine B. Ferry)

Q. Did Mr. Ferry ever receive any property by gift from anyone? A. No; he didn't.

Q. At the time that you married Mr. Ferry, or prior thereto, did you have any agreement or oral understanding with Mr. Ferry?

Mr. Mitchell: I object to the question as calling for the conclusion of the witness.

The Court: Strike out the word "agreement" and ask for a conversation, counsel.

Q. By Mr. Robinson: Did you have any conversation with Mr. Ferry relative to property matters prior to— A. Yes; we had a conversation when—

Q. Let us pin it down to what date?

A. Oh, I would say about December.

Q. Of what year? A. 1905.

Mr. Mitchell: Prior to marriage.

Q. By Mr. Robinson: And do you remember who was present? A. Just we two.

Mr. Mitchell: A little louder. I can't hear you.

Mr. Robinson: She said, "Just we two."

A. Just we two. [234]

Mr. Mitchell: All right.

Q. By Mr. Robinson: And, as closely as you can, can you repeat that conversation?

Mr. Michell: Just a moment. The place of this conversation has not been fixed.

Mr. Robinson: Oh, I don't believe it was.

Q. Where was this conversation?

A. In my home in Steubenville.

Mr. Mitchell: I still can't hear.

A. At my home in Steubenville, Ohio.

(Testimony of Catherine B. Ferry)

Mr. Mitchell: In your home in Steubenville, Illinois?

A. No; Ohio.

Mr. Robinson: In Ohio.

Mr. Mitchell: Oh, Ohio.

Q. By Mr. Robinson: Now that we are back in Ohio, what was the conversation?

A. Well, he said that neither of us had anything and that we would start out and whatever he would make would be part mine and if I made anything it would be part his, and we would go on a 50-50 proposition. [235]

* * * * *

Q. By Mr. Robinson: When you came to California in 1909 did you have any conversation with Mr. Ferry regarding the property?

A. Yes. He always told me when he—

Mr. Mitchell: Just a minute.

The Court: You will have to fix the time and place, Mrs. Ferry, as nearly as you can.

Q. By Mr. Robinson: Just as close as you can. I realize it is very difficult. It is a great number of years ago.

The Witness: Yes; it is pretty hard.

The Court: You came here in 1909?

A. 1909.

The Court: Was it in that year that you discussed any property arrangement, or not, if you remember?

A. It was 1910, I guess, when he—

The Court: All right. Where was that conversation?

A. That was in the home we had rented over in Highland Park.

Q. By Mr. Robinson: That was after he had made this settlement and you brought the money with you to California, wasn't it? A. Yes.

(Testimony of Catherine B. Ferry)

Mr. Mitchell: What was the answer?

The Court: In the home in Highland Park which they rented was the place of the conversation. [236]

Mr. Mitchell: Thank you.

The Court: After they received this money from Pennsylvania.

Q. By Mr. Robinson: And what was that conversation? Just as best you can tell it.

A. It is pretty hard to remember, only we were still going to be partners and that I would keep the house and help him all I could, and that he would go out and get his contracts.

Q. Was any reference made to this money that had been brought to California?

A. I don't remember of any reference. I don't just remember that.

Q. Did you render any services in connection with the business?

A. Well, I helped him a lot with his books and time-keeping and making up payrolls.

Mr. Mitchell: I think the time should be fixed.

Mr. Robinson: I will fix it.

Mr. Mitchell: Of when this was done.

Q. By Mr. Robinson: And during what period of time did you help him with his books and keep the checks and keep the payroll? You said "payroll"?

A. Yes; when he had payrolls.

Q. What period of time did you do this sort of work for him? [237]

A. Let's see; oh, I would say from 1919. I just don't remember.

(Testimony of Catherine B. Ferry)

Q. Let me ask you, when you were living up on Chevy Chase Drive did you do that work **then**?

A. No; I didn't do that then.

Q. How long prior to that time was it that you stopped doing it?

A. Just a couple of years.

Q. Just before you went to Chevy Chase Drive?

A. Yes.

Q. A couple of years before that?

A. Yes; a year or so before that.

Q. Do you recall the time that you entered into these various trusts at the various bank and title companies?

A. Yes; I do know.

Mr. Mitchell: I do not like to object to all these questions, your Honor, but it seems to me that counsel is endeavoring to establish an agreement fixing a separate ownership by each spouse of all accumulations, family accumulations, from the time of the marriage on, and not community co-ownership. I will object to it on that ground, since it is not supported by the refund evidence. There is no evidence that there was such an agreement at the time of marriage, in 1909, when they came, or in 1910, when they came to California. There is no evidence that the Commissioner was ever told of such facts. The only thing told the [238] Commissioner was that the property was all community, it was earned in California, all of it, and that therefore the wife had a community interest; and that in 1925, when four trusts were created, they entered into by their then conduct a property settlement agreement. This is an entirely different theory, an entirely different contention, and requires entirely different ultimate facts to support it.

(Testimony of Catherine B. Ferry)

I move that all of the evidence concerning this agreement be stricken.

The Court: I think the court ought to hear the facts as fully as possible, and then the application of the law, as I expect counsel to present the court, will be sifted out. I don't want to anticipate these matters.

Mr. Mitchell: I do not want the record to even indicate—

The Court: To show consent; no.

Mr. Mitchell: —that the Government has waived that objection.

The Court: No; that is proper.

Mr. Mitchell: I think I should make it from time to time.

The Court: I think you should, too, to protect your record; and I want counsel on both sides to do that. Overruled. Proceed.

Mr. Robinson: Was there a question pending, Mr. Reporter? [239]

The Court: No.

Q. By Mr. Robinson: Do you recall, Mrs. Ferry, that about November 2nd, 1925, you and your husband executed the Trust No. 1052 with the Title Guarantee and Trust Company? A. Yes; I do.

Q. Do you recall—

* * * *

Q. By Mr. Robinson: And that on or about the 9th days of April, 1925, that you and your husband signed a trust under which Citizens Trust and Savings Bank—being Trust No. 2012—was trustee? A. Yes; I do.

* * * *

(Testimony of Catherine B. Ferry)

Q. By Mr. Robinson: Do you recall that on or about the 9th day of October, 1925, you and your husband signed a trust, as trustors, under which Pacific Southwest Trust and [240] Savings Bank was trustee?

Mr. Mitchell: What is the number?

Mr. Robinson: That is Trust No. 4358.

A. Yes; I do.

Q. And later, do you recall Security-First National Bank took over Pacific Southwest Trust and Savings Bank?

We have an agreement to that effect.

Mr. Mitchell: Oh, yes, yes.

Q. By Mr. Robinson: Do you recall that?

Mr. Mitchell: I will stipulate that she signed all these trusts that have been introduced and that are attached to the stipulation of facts.

Mr. Robinson: I accept the stipulation.

Q. Do you recall that on or about the 10th day of February, 1925, that you and your husband signed a trust, as trustors, under which the Security Trust and Savings Bank was trustee? That was Trust No. 5869.

A. Yes; I do.

Mr. Mitchell: That is four trusts.

The Court: Yes. So far we have four trusts.

Q. By Mr. Robinson: Now, did you have any conversation or conversations with Mr. Ferry at or about the time that you and Mr. Ferry signed these trusts?

A. Yes.

Q. Did you have more than one conversation?

A. Well, yes; I guess we had several when we were [241] getting ready to put them in trust.

(Testimony of Catherine B. Ferry)

Q. Can you recall where any one of the conversations took place?

A. At our home on Acacia Street in Glendale.

The Court: The first trust was executed on February the 10th, 1925, No. 5869. Let us go from there, counsel.

Mr. Robinson: All right. Let us take the first trust. That was on February 10th, 1925.

The Court: No. 5869.

Mr. Robinson: That is No. 5869.

The Court: All right.

Q. By Mr. Robinson: Did you have any discussion relative to that trust or any other trusts on or about that time with Mr. Ferry?

A. Well, he said what we always had orally we would put into writing now and have our funds secure.

Q. And when did that conversation take place?

A. Oh, just around that time, before we—

Q. Did you anticipate, or did you talk at that time of creating more than one trust or creating all four of these trusts?

A. Well, I don't just remember, but I think we talked of all of them.

Q. Of creating all the trusts? A. Of all, yes.

Q. In other words, did you understand what was meant by [242] "what we had always had orally we would put into writing and make our funds secure"? Did you understand what that meant?

A. Well, I understood it meant what is—

Mr. Mitchell: Now, just a minute. I think it is up to the court rather than the witness to interpret what was said. That calls for the conclusion of the witness.

The Court: That is correct. You can give us any further explanation or any words that he used or that

(Testimony of Catherine B. Ferry)

were used by you, Mrs. Ferry, what the conversation was. Now, it took place in your house in Glendale and it was some time prior to February, 1925, when Mr. Ferry said that you would now put in writing your oral understanding that you had had over the years. What else was said? Were just you two alone there when you discussed it? A. Yes.

The Court: All right. Now, just try and check your memory back 13 years and see.

A. Well, as I remember, he said we had worked hard and had got these funds, and that we would put them now where we would be able to draw from them later or all along.

Mr. Mitchell: A little louder, please. I am a little bit hard of hearing.

The Court: "draw from the funds later or all along."

A. Where we could feel secure, in other words.

Q. By Mr. Robinson: Was any mention made of the fact of how the property was accumulated; or you just did not talk [243] but for a few minutes, I don't imagine, did you?

A. Well, it is so long ago I don't hardly remember it.

The Court: It is about 18 years ago, isn't it?

A. Yes; that is right.

Mr. Robinson: 18 years ago.

Q. Do you remember the gist of any further conversations that took place at that time?

Mr. Mitchell: I think I had better interpose another objection on the same grounds that I have made heretofore, in that the refund claim is based on a contract evidenced by conduct rather than by conversation. There is no evidence, either, that these conversations were called to the attention of the Commissioner or that they even

(Testimony of Catherine B. Ferry)

existed, but the refund claim is based entirely upon a contract arising out of conduct of the parties in creating a trust—creating certain trusts.

The Court: Well, I assume that “by conduct” presupposes some kind of conversation. I do not see how people can act without having some conversation, do you, Mr. Mitchell? It is pretty hard. Overruled and exception allowed the Government.

Q. By Mr. Robinson: Did you go to the bank with Mr. Ferry when you executed this trust and all other trusts? A. Yes; I did.

Q. Did you have any further conversation when you executed all these trusts, or was it all pursuant to your same [244] conversation?

A. Oh, it was about all the same, with the 50-50 we had always been through life, and we were getting where we would be secure.

Q. Do you recall when the ranch was purchased in Fresno County, the various times?

A. Well, I remember. Yes. I don't remember exact dates.

Q. Do you remember when Section 2 and Section 12 were purchased about the year 1932?

A. Yes; I remember that.

Q. Do you recall how those properties were purchased, who purchased them and who looked at them first?

A. Well, we went and looked together, and looked them over. He asked me should he take on any more property, or had we enough, and I was all in favor of taking more.

Mr. Mitchell: I can't quite hear you.

Mr. Robinson: She says, “I was all in favor of taking more.”

(Testimony of Catherine B. Ferry)

Q. Was any mention made as to what was to be done with those properties? A. What do you mean?

Q. When you acquired them did you plan to place them into a trust or hold them yourselves or what?

A. No; planned to place them in the trust.

Q. And what was done with the property? [245]

A. Placed in the trust.

Q. Did Mr. Ferry ever discuss with you business transactions that were pending or the buying and selling of property or business deals?

A. Yes; he always talked it over with me and we would go out and look at the property.

Q. About what date did Mr. Ferry start this practice?

A. As far back as I can remember.

Q. About the time of marriage, or after marriage?

A. No; after we came to California, after he got to owning property, after we got to owning the property.

Q. Do you recall any piece of property that Mr. Ferry bought or any transaction of any size that he entered into that he did not discuss with you first?

A. No; I don't.

Q. Would you say that he discussed all transactions?

A. Well, most all, I would say. There might have been some.

Q. What was his practice in discussing them? Would he ask your advice or ask your consent or tell you what he was going to do or what was it?

A. He always would say should we do it.

Q. Did you ever object, or always agree?

A. I always agreed.

Q. Did you ever buy any property with the moneys that had come in? [246] A. No; I didn't.

(Testimony of Catherine B. Ferry)

Q. By Mr. Robinson: Did you ever have any conversation with Mr. Ferry relative to the drawing of wills?

A. Well, we always were to will to each other what we had.

Q. When did that conversation come up?

A. I wouldn't be able to remember the date.

Q. Was it before marriage, after marriage, or when?

A. After marriage.

Q. After marriage? A. Yes.

Q. What could you will to him? Was that ever discussed? [247]

* * * * *

Q. By Mr. Robinson: Do you recall where any of these conversations relative to wills took place?

A. It would be at our home on Acacia Street.

Q. Was anybody present, or just the two of you?

A. No; just the two.

Q. What was said in regard to these wills?

A. Well, that we would will what I had to him and he would will what he had to me.

Q. Any discussion made as to what he had and what you had? A. Not at the time.

Q. Calling your attention to Trust 6204, do you remember having signed that trust with Mr. Ferry on or about the 5th day of June, 1930? Under that trust Citizens National Trust and Savings Bank of Los Angeles is trustee.

Mr. Mitchell: Mr. Reporter, give me the date.

A. Yes; I do.

Q. By Mr. Robinson: And do you recall the time that that trust was created? [248]

The Court: You have just stated June 5, 1930.

(Testimony of Catherine B. Ferry)

Q. By Mr. Robinson: Do you recall the surrounding time? Did you have any discussion with Mr. Ferry at that time?

A. Well, what trust?

Q. That is the trust at the Citizens National Bank; that is the same trust that the ranch is in.

The Court: 6204, June 5, 1930.

A. Well, just the same discussion that we had on all the others.

Q. By Mr. Robinson: Where did the discussion take place, if you recall?

A. At our home on Chevy Chase.

Q. Do you recall who was present, if anybody was?

A. I don't remember anybody. I don't remember anyone.

Q. You do not remember of anyone being present?

A. No. [249]

* * * * *

Los Angeles, California, Thursday, June 3, 1943.
10:00 a. m.

(Parties present as heretofore noted.)

(Case called for further trial and announced ready.)

The Court: Proceed.

Mr. Robinson: At this time we offer into evidence policy of The Prudential Insurance Company of America upon the life of Peter L. Ferry, No. 6908821, in the sum of \$50,000.

The Clerk: It is admitted, your Honor?

The Court: Admitted.

The Clerk: This will be Plaintiff's Exhibit 38 into evidence.

(The document referred to was marked Plaintiff's Exhibit No. 38, and was received in evidence.)

[Note: Plaintiff's Exhibit No. 38 will be found in the Book of Exhibits at page 747.]

Mr. Robinson: We offer into evidence the policy of The Prudential Insurance Company of America upon the life of Peter L. Ferry, No. 6908822, in the sum of \$50,000.

The Clerk: Plaintiff's Exhibit 39 into evidence.

(The document referred to was marked Plaintiff's Exhibit No. 39, and was received in evidence.)

[Note: Plaintiff's Exhibit No. 39 will be found in the Book of Exhibits at page 755.]

Mr. Robinson: We offer into evidence policy of The Pacific Mutual Life Insurance Company of California upon the life of Peter L. Ferry, No. 509810, in the sum of \$100,000.

The Clerk: Plaintiff's Exhibit 40 into evidence.

(The document referred to was marked Plaintiff's Exhibit No. 40, and was received in evidence.) [252]

[Note: Plaintiff's Exhibit No. 40 will be found in the Book of Exhibits at page 762.]

Mr. Robinson: At this time we offer into evidence, subject to corrections, if any appear, statement of income distributed to Peter L. Ferry and Catherine B. Ferry from Trust No. 2012. Citizens National Trust and Savings Bank.

Mr. Mitchell: What is this, please? So far as the figures are concerned, I think they are correct. I have no objection, subject to our comparing them with the originals. But we do object to the introduction of this evidence on the same grounds heretofore stated, that it is obviously intended to establish the community co-ownership of premiums paid for life insurance; that, if that is the purpose, it is objected to because there is a variance between the claim for refund and the evidence now produced in support of the suit, to-wit, the evidence can establish but one thing and that is, that the plaintiff owned a portion of this income as her separate property instead of as community property.

The other objection is that, assuming still that the purpose is to establish the ultimate fact that the premiums were paid with community funds or any funds owned by the plaintiff, it does not show, unless further evidence is introduced, that any of this money was used to pay premiums even though it might have been distributed to Mrs. Ferry. There is no evidence to establish the fact that premiums were paid or that the premiums paid can be traced back to these funds distributed to Trust 2012 to Mrs. Ferry. [253]

* * * * *

Mr. Mitchell: The further objection that this evidence is inadmissible until it is shown that, for example, the payments between April 9, 1925, and December 1, 1925, in the amount of \$552.34 were deposited in a certain bank. Those bank statements have not been produced. I do not recall any witness testifying that in the year 1925 \$552.34 was deposited in any particular bank, or that in the year 1926 \$1,042 was deposited in any particular bank. I do not recall any witness so testifying. I submit that, unless

such evidence is produced and tied up with not only the deposit in bank, but the checking out from that bank account by someone who owned the money, someone in whose name the money was vested, in payment of premiums, that there is no [255] proof that the premiums were paid with money belonging to Mrs. Ferry, whether it was her separate money or her interest was merely that of a community interest, new type community interest. [256]

* * * * *

The Court: Motion overruled. Proceed.

The Clerk: This will be Plaintiff's Exhibit 41 into evidence.

(The document referred to was marked Plaintiff's Exhibit No. 41, and was received in evidence.)

[Note: Plaintiff's Exhibit No. 41 will be found in the Book of Exhibits at page 771.]

Mr. Mitchell: May I have a copy of that, Mr. Robinson?

Mr. Robinson: Yes; you have a copy of it.

I offer into evidence statement of income distributed to [258] Peter L. Ferry and Catherine B. Ferry in Trust No. 1080, Title Guarantee and Trust Company.

Mr. Mitchell: We make precisely the same objections on precisely the same grounds.

The Court: Let the record so show.

Mr. Mitchell: And that the amounts traced are subject to verification.

The Court: The record will so show.

The Clerk: That will be Plaintiff's Exhibit 42 into evidence.

(The document referred to was marked Plaintiff's Exhibit No. 42, and was received in evidence.)

[Note: Plaintiff's Exhibit No. 42 will be found in the Book of Exhibits at page 772.]

Mr. Mitchell: That is Trust No. 1080.

Mr. Robinson: I offer into evidence statement of income paid to Catherine B. Ferry from Trust No. S-5869, Security-First National Bank of Los Angeles.

The Clerk: Plaintiff's Exhibit 43 into evidence.

(The document referred to was marked Plaintiff's Exhibit No. 43, and was received in evidence.)

[Note: Plaintiff's Exhibit No. 43 will be found in the Book of Exhibits at page 773.]

Mr. Mitchell: May I look at that a moment? This does not indicate to whom those payments were made, does it, Mr. Robinson? Oh, they are all to Catherine B. Ferry.

Mr. Robinson: Yes.

Mr. Mitchell: That, I would like to have introduced subject to checking because I have not had an opportunity to do it. [259]

Mr. Robinson: That is understood, Mr. Mitchell.

Mr. Mitchell: Yes; and the same objections on the same grounds, of course.

Mr. Robinson: I offer into evidence the distribution of income from Trust No. 4358, Security-First National Bank, to Peter L. Ferry and/or Catherine B. Ferry as indicated upon such schedule.

Mr. Mitchell: The same objection on the same grounds, and subject to verification of the dates and amounts and the persons to whom the checks were payable.

The Clerk: Plaintiff's Exhibit 44 into evidence.

(The document referred to was marked Plaintiff's Exhibit No. 44, and was received in evidence.)

[Note: Plaintiff's Exhibit No. 44 will be found in the Book of Exhibits at page 776.]

Mr. Robinson: Mr. Mitchell, do you have the income tax returns for Peter L. Ferry and Catherine B. Ferry for the year 1928?

Mr. Mitchell: I have a certified copy of the individual income tax return for 1928 filed by Peter L. Ferry; I have also the original income tax return of Mrs. Ferry for the year 1928, the original return.

Mr. Robinson: I offer into evidence original letter dated November 8, 1930, from the Treasury Department to Mr. Peter L. Ferry, together with enclosure attached thereto under the same date, to-wit, November 8, 1930, addressed to "Peter L. Ferry." I have not laid a foundation for this, Mr. Mitchell. If you desire, I will. [260]

Mr. Mitchell: So far as the foundation is concerned, all right. I do not see the materiality of this, your Honor.

The Court: What is the point? What is the materiality of it, counsel?

Mr. Robinson: It shows a distribution of income between Mr. and Mrs. Ferry.

Mr. Mitchell: Separate income or community income?

Mr. Robinson: It likewise shows the amount of income received by each during that year.

Mr. Mitchell: If counsel will not commit himself, in view of the fact this evidence will only go to show the

receipt of separate income by Mrs. Ferry, it is therefore objected to on the grounds it tends to establish a variance between the refund claim and the suit; and the evidence which plaintiff is now offering in this court in support of a contention entirely different from that made in the refund claim, and facts were not submitted to the Commissioner in connection with the consideration of the refund claim in the estate tax case.

The Court: Overruled.

The Clerk: Plaintiff's Exhibit 45 into evidence.

(The document referred to was marked Plaintiff's Exhibit No. 45, and was received in evidence.)

[Note: Plaintiff's Exhibit No. 45 will be found in the Book of Exhibits at page 781.]

Mr. Robinson: As explanatory of said Exhibit 45 just introduced, I offer into evidence original income tax return of Mrs. Peter L. Ferry for the year 1928. [261]

The Clerk: Plaintiff's Exhibit 46.

Mr. Mitchell: Just a minute. Whose return is this? This is plaintiff's own return. It is objected to on all of the grounds heretofore stated; upon the further ground that it is a self-serving declaration upon the part of the plaintiff herself.

The Court: Admitted.

Mr. Mitchell: I would like a ruling on that objection because that is important. The Government can introduce income tax returns signed by a plaintiff in connection with another case if they show declarations against interest or admissions, but the plaintiff herself cannot introduce declarations such as this in her own favor. As I pointed out, day before yesterday, in support of a similar objection on self-serving declarations—I do not think it is necessary to read that again to your Honor:—

“The reasoning which precludes a party from offering self-serving statements is self-evident.” and so on.

Your Honor will recall my reading from Jones Commentaries on Evidence. The rule is rather elementary. And we object to that on the ground that it is a self-serving declaration.

Counsel is also going to offer the return of Peter L. Ferry for the same year and that offer might be made in connection with this one. The same objection will be made, that it is a self-serving declaration. This is a suit by his [262] estate and is in privity with him. Both are self-serving declarations. [263]

* * * * *

The Court: I am not going to assume, Mr. Mitchell, that the Government is going to be in a position to take advantage of this situation and a taxpayer and an individual can't against the Government. They will have to reverse me on that. I do not believe that the Government can come in and contend that it has all these advantages and a taxpayer has none.

Mr. Mitchell: The taxpayer's advantages are very well illustrated in this case, your Honor. Here is a case where decedent died in 1935. This is 1943, eight years after the death of the decedent, after the refund claim is filed, after it is passed upon by the Commissioner, after the taxpayer has neglected to give to the Commissioner the detailed facts as required by the law and, for the first time, in the trial of the case yesterday, attempts to prove an agreement between husband and wife in Pennsylvania in the year 1906, [265] 37 years ago. There is an advantage that the Government has not, a tremendous advantage in favor of the taxpayer. That evidence has gone in over the Government's objection and the Government has absolutely no way of checking it and preparing a defense to meet it.

Yesterday, for the first time, the witness gets on the stand and attempts to prove a partnership agreement between herself and her husband by conversations that took place in 1906 and in 1909. [266]

* * * * *

The Court: For instance, Mr. Mitchell, take this Exhibit 43 which shows for 1925-1935, a period of 10 years, that out of this trust there was distributed to Catherine Ferry \$7,826.78; is it your contention that that was not her separate property?

Mr. Mitchell: Oh, no, your Honor.

The Court: It is clear to me that it is and the record here shows—

Mr. Mitchell: That is my opinion.

The Court:—that it was her property.

Mr. Mitchell: My opinion is that it was distributed to [270] her and her property.

The Court: And her property.

Mr. Mitchell: Her separate property, not community.

The Court: No; separate property.

Mr. Mitchell: That is right.

The Court: Oh, yes. It could hardly be community property in that light. Well, I have that argument and I will overrule the objection, and exception allowed to the Government. Proceed, counsel.

The Clerk: This exhibit, individual tax return of Mrs. Peter L. Ferry, is Plaintiff's Exhibit 46 into evidence.

(The document referred to was marked Plaintiff's Exhibit No. 46, and was received in evidence.)

[Note: Plaintiff's Exhibit No. 46 will be found in the Book of Exhibits at page 795.]

The Court: I have Exhibit 42 before me showing distribution of income out of Trust No. 1080, \$2,218.38, but there is no indication on the exhibit as to whom that was payable.

Mr. Robinson: At the time of the offer I made the statement that it was payable to Mr. and Mrs. Ferry. I am sorry that that was not placed upon the exhibit.

The Court: The statement would not be evidence unless the Government accepts it.

Mr. Mitchell: No, your Honor; the Government does not accept that as evidence that Mrs. Ferry received anything. That is a statement by counsel.

Mr. Robinson: Will you stipulate, Mr. Mitchell, that those payments were made from the trust for the one-tenth [271] interest in the trust held by Mr. and Mrs. Ferry?

Mr. Mitchell: Paid to someone, yes; I will stipulate to that, subject to all of my objections.

Mr. Robinson: For that one-tenth interest?

Mr. Mitchell: If that is it.

Mr. Robinson: For that one-tenth interest in Trust 1080 that was provided as being owned by Mr. and Mrs. Ferry as joint tenants.

Mr. Mitchell: Yes. I will not stipulate as to whom the checks were made payable or what was done with it.

The Court: All right; that clarifies the record, gentlemen. Proceed.

Mr. Mitchell: Just a minute. Or to whom the checks were delivered.

Mr. Robinson: I offer into evidence individual income tax return for the year 1928 for Peter L. Ferry & Haines Canyon Rock Company.

Mr. Mitchell: The same objection on all of the same grounds.

The Court: Overruled and exception allowed the Government.

The Clerk: Plaintiff's Exhibit 47 into evidence.

(The document referred to was marked Plaintiff's Exhibit No. 47, and was received in evidence.)

[Note: Plaintiff's Exhibit No. 47 will be found in the Book of Exhibits at page 797.]

Mr. Robinson: Mrs. Ferry, will you take the stand again, please? [272]

CATHERINE B. FERRY,

the plaintiff herein, recalled as a witness in her own behalf, having been previously duly sworn, was examined and testified further as follows:

Direct Examination

(resumed.)

By Mr. Robinson:

Q. What is your age, Mrs. Ferry?

A. 58 I will be on the 12th day of this month. [273]

* * * * *

Q. By Mr. Robinson: Do you recall that following the creation of Trust No. 6204, that thereafter other pieces of real property were transferred to this trust by you and Mr. Ferry? A. Yes; I do.

Q. Do you recall the circumstances surrounding each one of those transfers?

A. Well, we just said we had added more; when we put this property in we added it onto the trust.

Q. Who added that property to the trust; do you recall that, whose act it was? A. Both of ours. [274]

* * * * *

(Testimony of Catherine B. Ferry)

Q. By Mr. Robinson: Do you recall the time and place of each one of the conversations when these properties were put into the trust and where they took place?

A. Well, the conversation would take place at the ranch.

Q. That is, in regard to each one?

A. To the pieces of the extra property that we bought.

Q. That is the one that you have already testified to?

A. Yes.

Q. Then, on the other properties that were put in are you familiar with the San Bernardino property, that is, the [275] North Half of the West Half of the Southwest Quarter of the Southwest Quarter of Section 27, Township 1 North?

A. I think that is the desert property.

Q. I believe it is. Are you familiar with that property, how it was put in?

A. Just in the same manner.

Q. Calling your attention, Mrs. Ferry, to the premiums that were paid on all the life insurance that was outstanding on the life of Mr. Ferry, who usually drew the checks? [276]

* * * * *

The Court: The objection is good. First, have them identified, counsel, and then you will have the record a little clearer, for identification, and then have the witness testify.

The Clerk: This first group of checks will be Plaintiff's Exhibit 48, for identification?

The Court: How many checks?

(Testimony of Catherine B. Ferry)

The Clerk: I count 27 checks, your Honor, as being Plaintiff's Exhibit 48, for identification.

(The checks referred to were marked Plaintiff's Exhibit No. 48, for identification.)

[Note: Plaintiff's Exhibit No. 48 will be found in the Book of Exhibits at page 799.]

The Court: Proceed with that exhibit, and then Mr. Cross can mark the others while you are examining on this one.

Mr. Mitchell: May I see them, Mr. Robinson?

Mr. Robinson: Oh, yes. [277]

* * * * *

Mr. Robinson: At this time I offer into evidence exhibits marked, for identification, Nos. 48 to 58, both inclusive.

Mr. Mitchell: These are objected to on the ground that [278] they are cumulative. The evidence already shows that the premiums were paid. Upon the further ground that if they are intended to establish community co-ownership of the premiums paid, they are wholly insufficient, they are self-serving to that extent; and also objectionable for the reason that there is no showing that the funds upon which these checks were drawn were community funds, no evidence whatever.

If they are intended to establish that the premiums were paid with some separate funds of Mrs. Ferry, then they are objected to on the ground that that would be a variance from the claim for refund; and upon the further ground that there is no evidence that the bank funds and commercial accounts upon which these checks were drawn was separate property of either spouse. [279]

(Testimony of Catherine B. Ferry)

* * * * *

The Court: I will hear from Mr. Mitchell. [280]

* * * * *

All right. Subject to the objection of the Government, they will be admitted and exception allowed the Government. Proceed.

The Clerk: Plaintiff's Exhibits 48 to 58, inclusive, admitted into evidence.

(The checks referred to were marked Plaintiff's Exhibits 48 to 58, both inclusive, and were received in evidence.)

[Note: Plaintiffs Exhibits Nos. 48 to 58 will be found in the Book of Exhibits at pages 799 to 822.]

Q. By Mr. Robinson: Mrs. Ferry, are you familiar with what was done with the moneys that were received by either you and/or your husband, Mr. Ferry, from the various trusts that are involved herein?

A. They were always deposited.

* * * * *

The Court: Just a moment. I don't remember whether the Government interposed an objection as to the foundation for these. If the Government has, you will have to prove the signatures.

Mr. Mitchell: No. [281]

* * * * *

Q. By Mr. Robinson: Mrs. Ferry, did you and your husband keep books?

A. Well, yes; we kept sort of books in the earlier years.

(Testimony of Catherine B. Ferry)

Q. In the earlier years. And in the later years did you keep books? A. Yes; we did.

Q. Where are those books?

A. Well, I don't know.

Q. Have you made a search for the books? [282]

A. Yes.

Q. Have you been able to find them?

A. No; we haven't.

Q. Did you keep copies of all deposit slips?

A. We always did.

Q. And where are those copies?

Mr. Mitchell: "Always" what?

Mr. Robinson: "Always did."

A. Yes; we always had copies.

Q. Do you know where those copies are?

A. No; I don't.

Q. Have you looked for them? A. Yes.

Q. And have you been able to find them?

A. No; we haven't.

Q. Did you check with the bank, the various banks, to find out if any of their records relative to your accounts are available? A. Did I check with the banks?

Q. Or did you cause a check to be made?

A. Yes: there was a check. [283]

* * * * *

Q. By Mr. Robinson: Did you receive any records from the banks of deposit slips or records of checks drawn and signature cards? A. Yes; we did.

Q. Those are the same checks that you delivered to me? A. Yes.

* * * * *

(Testimony of Catherine B. Ferry)

The Court: Did you receive any others, anything else from the bank? A. No; not to my knowledge.

[284]

* * * * *

Q. By Mr. Robinson: What bank accounts did you and/or your husband have during your lifetime in California? A. Well, in the First National.

* * * * *

Q. By Mr. Robinson: During the period since you have resided in the County of Los Angeles what bank accounts did you and/or your husband and your husband have in banks?

Mr. Mitchell: I still call it a compound question and unintelligible; and also, it covers a period that is not material. The only period material here, if it refers to the premiums on insurance, is the period subsequent to July 29, 1927. That is the only portion that plaintiff has ever [285] contended that the premiums were paid partially with funds in which plaintiff had a new type community interest, or at present under her present claim, that she had her present claim.

Mr. Robinson: I cannot acquiesce in counsel's statement. The plaintiff is contending that the entire contribution of Mrs. Ferry to these insurance policies should be included in the gross estate.

* * * * *

Q. By Mr. Robinson: During the time that you and Mr. Ferry were in California do you recall what bank accounts stood in your name or in his name or in both your names? A. It was always in both names.

[286]

* * * * *

(Testimony of Catherine B. Ferry)

Q. By Mr. Robinson: Mrs. Ferry, do you know where the pass-books are on all of these accounts out of which the insurance premiums were paid?

A. No; I don't. [288]

Q. Have you looked for them?

A. Yes; I have.

Q. Did you find them? A. No; I didn't.

* * * * *

Q. By Mr. Robinson: Do you know whether or not the pass-books on these various accounts showed the moneys that were deposited to the accounts?

A. Well, when you deposit them there, I don't see why the pass-book would not show them.

Q. You made some of these deposits, did you?

A. Yes; I did. [289]

Q. On the deposits that you made were those deposits reflected in the pass-books? A. They always were.

Q. Is it your best recollection that any other deposits made to those accounts were reflected in the pass-books?

A. Yes. [290]

* * * * *

Mr. Robinson: —commencing January 1, 1925, and ending with the date of your husband's death, to what banks were the moneys that you deposited from the various trusts deposited?

Mr. Mitchell: I object to the question on the ground that it does not ask the witness what was shown by the bank deposit books that she is unable to find.

* * * * *

Q. By Mr. Robinson: What bank accounts?

Mr. Mitchell: That is confined to Mrs. Ferry.

(Testimony of Catherine B. Ferry)

A. At the First National Bank of Glendale.

Q. By Mr. Robinson: What other banks?

A. And the California Bank.

The Court: In Los Angeles or over in Glendale?

A. In Los Angeles. [291]

* * * * *

The Court: You have named two banks, Mrs. Ferry, the First National Bank of Glendale, you said you did business [293] with, and the California Bank in Los Angeles you did business with, and counsel asked you if you did business with the State Bank of Glendale.

Mr. Robinson: Glendale State Bank.

The Court: Glendale State Bank.

A. Yes; I did.

The Court: Any others?

A. And I think it was the American.

The Court: American National?

Q. By Mr. Robinson: That is the American National Bank of Glendale? A. Yes.

The Court: Any others?

A. Well, none that I can think of.

The Court: Now, you did business with those, did you, from 1925 to 1936?

A. Well, some of them were out of existence, I think.

Q. By Mr. Robinson: On the other deposits of the income from these trusts that were made, do you know who made those deposits?

Mr. Mitchell: I object to that question. It would be impossible for this witness—well, she may answer yes or no, if she knows.

Q. By Mr. Robinson: Do you know?

A. I did not understand the question.

(Testimony of Catherine B. Ferry)

Q. On the remaining deposits of the income from these [294] trusts do you know who made the deposits?

A. Well, Mr. Ferry.

Q. Do you know to what bank accounts or bank account he made those deposits?

A. Yes, sir.

* * * * *

Q. By Mr. Robinson: Did Mr. Ferry ever tell you to what bank accounts he was making the deposits of these incomes?

A. Well, I would say yes because I had access to the bank books. [295]

Q. Let me ask you this way: Was any of the income from any of these trusts ever negotiated or cashed, or was it always deposited?

Mr. Mitchell: Objected to as not the best evidence and calling for a conclusion of the witness, and it is a compound question.

The Court: I think the question should be limited to what she did with the checks that she got, counsel.

Mr. Robinson: Isn't this witness competent, if she knows of her own knowledge what Mr. Ferry did with certain checks?

The Court: Yes. If she knows of her own knowledge what he did with them, why, of course, if she was with him when the deposit was made, or if she examined the pass-book and saw the entry there, why, that would be competent.

Q. By Mr. Robinson: Did Mr. Ferry ever set down any rule—I just want a yes or no answer—any rule relative to the moneys that were coming in from any source, including from these trusts?

A. Yes; he did.

(Testimony of Catherine B. Ferry)

Q. Do you recall approximately when that rule was set down?

A. Well, as long back as I could remember—as I can remember.

Q. Do you recall the approximate date?

A. No; I wouldn't be able to. [296]

Mr. Mitchell: What did this rule concern?

Q. By Mr. Robinson: What was that rule?

* * * * *

The Court: Was any rule set down about handling these funds? And she said yes.

Mr. Mitchell: About handling the funds. That is what I wanted to know.

The Court: That is right.

Q. By Mr. Robinson: What was that rule?

Mr. Mitchell: Just a minute. What funds? I think that is very vague. I don't know what funds the question refers to.

Mr. Robinson: The question did not use the word "funds."

Mr. Mitchell: Regarding any funds do you mean?

Mr. Robinson: Do you wish to read the question to Mr. Mitchell?

(Record read by the reporter as requested.)

Q. By Mr. Robinson: What was that rule?

A. That no checks were ever to be cashed; they all had to be deposited.

Q. Did Mr. Ferry or did you or did either one of you [297] or both of you during the period from 1925 to the date of his death maintain any bank accounts other than the four that you have mentioned? A. No.

(Testimony of Catherine B. Ferry)

Mr. Mitchell: Now, just a minute. I object to that question. No evidence that the witness knows all of the bank accounts carried by Mr. Ferry during his marriage.

Mr. Robinson: The evidence has shown that she is the wife of Mr. Ferry; that they were together in business; that they were partners in business; one partner, the knowledge of one is the knowledge of the other.

* * * * *

Q. By Mr. Robinson: Do you know of any other bank account that you had or that Mr. Ferry had or that you and Mr. Ferry had, or you or Mr. Ferry had from the period of 1925 to the date of his death, other than the four you have mentioned? Do you know of any others?

[298] A. Not to my knowledge.

Q. Have you been able to locate any other bank account for the period commencing January 1, 1925, to the date of his death that was his bank account or your bank account, or both your bank accounts or either one of your bank accounts?

A. No; I haven't.

* * * * *

Q. By Mr. Robinson: Do you know of any occasion on which you or Mr. Ferry or any other person cashed any check, draft or other instrument transmitting income from any one of these trusts in question?

A. No; I don't.

Q. Do you know of any instance when any check, draft, note, or bill of exchange or other instrument received by you or Mr. Ferry or both of you or either of you from any source during your married life was ever cashed?

A. No.

(Testimony of Catherine B. Ferry)

Q. Calling your attention to the last war, about the year 1917 or 1918, did you execute a will?

A. Yes; I did.

Q. Did Mr. Ferry execute a will at that time?

A. Yes; he did.

Q. Where is your will and where is his will that were [299] executed at that time?

Mr. Mitchell: That is objected to as incompetent, irrelevant and immaterial.

The Court: Just what would that show, counsel?

Mr. Robinson: It is going to show simply a declaration by each of them as to their properties.

Mr. Mitchell: It would be objected to further on the ground it is self-serving, your Honor, the same grounds that I have related heretofore.

Mr. Robinson: I don't want to prompt the witness.

The Court: The fact that a person, by will, disposes of all his or her property to another party, would that on its face show—

Mr. Robinson: They could make a will and dispose of property and, as your Honor stated yesterday, they could have legally done it wrong; they could have disposed of property that did not belong to them. But where the husband is present and the wife, the two of them together draw wills, I feel that it has probative effect.

The Court: But the will would be merely disposition of property, wouldn't it?

Mr. Robinson: An intended disposition of property and also a declaration of what property the testator thought that he had that he could dispose of.

Mr. Mitchell: That declaration would be a declaration, of course, against interest. [300]

Mr. Robinson: Which would be admissible.

(Testimony of Catherine B. Ferry)

Mr. Mitchell: I mean a self-serving declaration, I should say.

The Court: I do not see how it would be self-serving if it would show that he was only claiming a part of what, on the face of it, looks like an entire interest in a piece of property. I do not see how that could be self-serving.

Mr. Mitchell: It might not. I have not seen the will.

The Court: No; I haven't, either.

Mr. Mitchell: Never heard of it before. I will object to it further on the ground it was not submitted to the Commissioner in support of the refund claim and tends to establish a variance between the claim and the suit, no evidence that it was considered by the Commissioner, even.

The Court: It is not my understanding that every bit of testimony must be submitted to sustain the claim to the Commissioner. I do not believe that every single item must be submitted to the Commissioner, otherwise it is objectionable.

Mr. Mitchell: No, your Honor; that is not my point. Obviously, as I believe counsel brought out yesterday, it was at some time that the spouses agreed to make mutual wills, each leaving his or her property to the other. It is a rule where spouses in California, or any other State, make such an agreement that that agreement is binding. It becomes a contract, those mutual wills. I take it that this evidence [301] is offered to support the contention made by plaintiff yesterday for the first time in this case that a partnership agreement was established in 1906 and 1909 by the spouses, and that these mutual wills will tend to support that ground for recovery that there was a partnership or a co-ownership commencing in 1906 at the time of marriage. We object to it on the

(Testimony of Catherine B. Ferry)

ground that that will be a variance from the refund claim, between the suit and the refund claim, and that the refund claim does not support that contention, that ground, and any evidence to support that ground.

The Court: Where are the wills? Is the witness going to attempt to testify as to the contents of these written instruments from memory?

Mr. Robinson: After the foundation is laid.

The Court: Proceed with the foundation.

Mr. Robinson: Will you read the pending question to the witness, Mr. Reporter?

(Record read by the reporter, including the pending question, as follows:

“Q. Where is your will and where is his will that were executed at that time?”)

Mr. Robinson: That is, the originals?

A. Well, as the new ones were made the old ones were destroyed.

Q. And did you retain copies of either of the wills?

A. No. [302]

Q. Have you made a search for the copies?

A. Yes; I did.

Q. Have you been able to find them?

A. I haven't.

Q. Do you recall what your will provided and what his will provided?

Mr. Mitchell: I object to that question, not because the foundation has not been laid, but because of all of the objections which I just stated to the court.

The Court: Overruled and exception allowed to the Government. What is the date of these wills?

(Testimony of Catherine B. Ferry)

Q. By Mr. Robinson: What was the approximate date of the wills?

A. Well, I guess it would be about 1918.

Q. Is there any particular fact that brings it to your attention that you place the date in that year?

A. Well, it was just during the World War and he was working away most of the time.

Q. What did your will provide and what did his will provide?

Mr. Mitchell: The same objection.

The Court: Overruled: exception allowed the Government.

Mr. Robinson: You can answer the question.

The Witness. What was the question?

Q. By Mr. Robinson: What did your will provide and what did his will provide? [303]

A. Well, that I was—

Mr. Mitchell: The same objection.

The Court: Same ruling.

A. That I was to leave my half to him and he was to leave his to me, and then if anything happened to us, the children.

Q. By Mr. Robinson: It was to go to the children?

A. The children; yes. [304]

* * * * *

Q. By Mr. Robinson: Do you know what he was doing during the last year of his life?

A. Do you mean what business?

Q. In connection with business.

A. Well, the ranch and he was over at the yards, what we call the business.

(Testimony of Catherine B. Ferry)

Mr. Mitchell: What was the last answer? I didn't get it.

A. We always called it the "yard." It was his place of business, where he had had the equipment.

Q. By Mr. Robinson: Are you referring to the place that Mr. James Ferry bought? A. Yes.

Q. He spent some time over there? A. Yes. [308]

* * * * *

Q. I want to call your attention—

Did you have a conversation with Mr. Ferry prior to the time you came to California and after the settlement you had made, the settlement with his brother and his father?

Mr. Mitchell: Just a moment. There is no evidence that this witness made any settlement between her husband.

Mr. Robinson: I say, at the time the settlement was made between his brother and his father.

Mr. Mitchell: That question is also objected to on the ground that it has already been asked and answered as to the conversation that took place between this witness and her husband at that time.

Mr. Robinson: I do not recall it. I do not recall it.

Mr. Mitchell: I object to the question.

The Court: The evidence shows there was something like \$14,000 that was Mr. Ferry's part of the dissolution and that was the money that he brought to California. [309]

Mr. Mitchell: Yes, your Honor. But here, this 1905 conversation in Ohio, in the witness' own home in Ohio, prior to marriage.

Mr. Robinson: The conversation I am calling her attention to or attempting to is at the time the settlement

(Testimony of Catherine B. Ferry)

was made in 1909. That was before marriage and this was after marriage.

Q. Do you recall having any conversation on or about the time that settlement was made?

A. Yes. He asked me—

Mr. Mitchell: Just a moment.

Mr. Robinson: Just answer yes or no.

A. Yes; I do.

Q. You did have a conversation? A. Yes.

Q. Do you recall where it was?

A. It was at his home in Crafton, Pennsylvania.

Q. Where you were both living?

A. He was there just before we came to California.

Q. You were just there temporarily?

Mr. Mitchell: What year was this?

Q. By Mr. Robinson: What year was this?

A. That would be 1909.

Q. And who was present?

A. Just the two, just Mr. Ferry and I.

Q. Do you recall what that conversation was? [310]

Mr. Mitchell: It is objected to, if the court please, on all of the grounds heretofore stated relating to the sufficiency of the refund claim to support the suit, and a variance between the suit and the refund claim, and self-serving declarations.

The Court: Overruled. Exception allowed the Government. Proceed.

Q. By Mr. Robinson: What was that conversation?

A. Well, he asked me how I would like to come to California and we would start anew and we would be partners; half would be mine, and whatever losses we would have we would share equally.

(Testimony of Catherine B. Ferry)

Q. Did you agree to that?

A. Just words to that effect.

Mr. Mitchell: I object to that question as calling for a conclusion of the witness.

Mr. Robinson: I will strike the question.

Q. Did you have confidence in Mr. Ferry in his business ability? A. Yes; very much so.

Mr. Mitchell: I will stipulate that the witness had confidence in her husband. [311]

* * * * *

Mr. Robinson: May it please the court, it has come to my attention that Exhibit No. 1, the stipulation of facts in this matter—it was my understanding that that has been offered and received into evidence. However, the clerk has it marked for identification at this time, and to be sure there is no mistake in the record, I will again offer Exhibit No. 1 into evidence.

The Court: It was offered into evidence and accepted into evidence, and the only reservation to the acceptance was the reservation of the ruling on the objection counsel made to certain parts of it, and after hearing that, I overruled the objection.

Mr. Mitchell: That was my understanding, your Honor.

Mr. Robinson: That was my understanding.

(The document referred to was marked Plaintiff's Exhibit No. 1, and was received in evidence.) [312]

[Note: Plaintiff's Exhibit No. 1 will be found in the Book of Exhibits at page 457.]

* * * * *

Mr. Robinson: At this time plaintiff asks leave of court to amend by interlineation her "Second Amendment to Complaint for Refund of Federal Estate Taxes Illegally Collected" on file herein, by inserting the following language:—

* * * * *

Mr. Robinson: Page 2 of the second amended complaint, on line 21, following the word "corpus" to insert the following language: "and"—

The Court: Just a moment. You are ahead of me, too.

Mr. Robinson: The second amended complaint, page 2, line 21.

The Court: Yes.

Mr. Robinson: Following the word "corpus" on said line, [313] to insert the following language: "and income available for distribution."

Mr. Mitchell: I should like to make an objection as soon as I make a note of that. If the court please, the Government objects to that motion for leave to amend the complaint to state a new ground for recovery; and in that connection the Ninth Circuit has decided in the case of *B. F. Goodrich Co. v. United States*, on the 13th of last April, less than two months ago, that an amendment such as is now proposed by the plaintiff should not have been made by the court over the Government's objection, in the court room of Judge Harrison of this court, and holds that such an amendment, making this change in the complaint—the original complaint alleged that the plaintiff acquired the claim for refund by virtue of a written assignment. The amendment proposed to change that allegation to read: "Plaintiff acquired this claim by operation of law resulting from the liquidation of a subsidiary corporation." And the Ninth Circuit sustained

the decision of the trial court, denying the motion to so amend. I have a copy of the opinion here. I don't know whether your Honor has read it or not.

The Court: I have read it but I am not very familiar with it.

(Mr. Mitchell hands book to the court for examination.)

The Court: In fixing the estate tax liability, then, as I understand it, the Commissioner did not include the [314] income available for distribution?

Mr. Mitchell: Oh, no, your Honor. The Commissioner did include the income available for distribution.

The Court: Then, what is the objection?

Mr. Mitchell: It is a new ground for recovery. It applies to income available for distribution rather than to corpus. Day before yesterday I called your Honor's attention to the original estate tax return which relates to corpus, to the refund claim which relates to corpus, to the alleged amendment entitled "Protest" which relates to corpus, and the original complaint that relates to corpus, and this amended complaint which counsel now desires to amend which relates only to corpus.

The Court: That is correct. Those facts are all clear; there is no doubt about it.

Mr. Mitchell: Now, the Commissioner did include the corpus and he included the income available for distribution, of course. But there was no claim that the Commissioner erred in including the income available for distribution. The only ground alleged in the refund claim is that the Commissioner erred in including half of the corpus, not half of the income available for distribution; and that is the amendment that counsel now desires to make. It is not supported by the refund claim, nor by the original complaint, and is a surprise to the Govern-

ment that they are now questioning the includability of one-half of such income [315] available for distribution.

That is our point that we have been making all the way through, of course, that the refund claim does not support such a claim, such facts.

To refresh your Honor's memory again as to the regulation, Article 99 of Regulations 80, 1937 Edition:

"The claim must set forth in detail and under oath each ground upon which a refund is claimed and facts sufficient to apprise the Commissioner of the exact basis thereof. Any claim which does not comply with the requirements of the preceding sentence shall not be considered for any purpose as a refund claim."

The court is without jurisdiction to entertain a suit that is not supported by a refund claim. Then the regulation goes on:

"Save in the case of a claim for a refund of an overpayment computed in accordance with the decision of the Board of Tax Appeals which has become final, the burden of proof rests upon the plaintiff and all facts relied upon in support of the claim must be clearly set forth under oath." [316]

* * * * *

Mr. Robinson: I call attention to the letter—I will mark it for identification—letter dated January 25th, 1937, from the Treasury Department to "Estate of Peter Ferry, Freston & Files, Attorneys for the Executrix."

The Clerk: That is Plaintiff's Exhibit 59 for identification.

(The document referred to was marked Plaintiff's Exhibit No. 59, for identification.) [332]

[Note: Plaintiff's Exhibit No. 59 will be found in the Book of Exhibits at page 823.]

* * * * *

The Court: Gentlemen, I will be able to rule on this when I know what this \$610,837.45 that the Commissioner is discussing and which is evidently—

Mr. Robinson: Included in that figure your Honor has just mentioned is the entire value of Trust No. 1052. [333] Mr. Eddy, in his letter, places a value on all of the trusts.

The Court: That is not in evidence, is it?

Mr. Robinson: No.

The Court: So I can't consider that.

Mr. Mitchell: Why don't you offer it in evidence, Mr Robinson? I have no objection to Mr. Eddy's letter to the plaintiff going into evidence.

The Court: All right; in evidence. Now go ahead and give me your deductions.

(The document referred to was marked Government's Exhibit No. 59, and was received in evidence.) [334]

[Note: Government's Exhibit No. 59 will be found in Book of Exhibits at page 823.]

* * * * *

CATHERINE B. FERRY,

recalled as a witness on behalf of plaintiff, having been previously duly sworn, was examined and testified further as follows:

Direct Examination

(resumed.)

By Mr. Robinson:

Q. Do you know approximately what your living expenses of you and Mr. Ferry and your family were from 1927 to 1935, [335] each year? Answer yes or no.

A. Yes.

(Testimony of Catherine B. Ferry)

* * * * *

Q. Do you know approximately what your expenses ran in the way of living expenses such as food, clothing, meals, upkeep of your home, utilities, dental bills, school tuitions and like matters ran, what that amounted to each year from 1927 to 1935?

A. Well, around a thousand dollars a month.

Q. And prior to that time?

Mr. Mitchell: I did not get the answer.

The Court: Around a thousand dollars a month.

Mr. Robinson: Around a thousand dollars.

Q. And prior to that time, say, from 1920 to 1927, approximately how much did they run?

A. Well, approximately around \$500.

Q. And before that, from the time you were married up until 1920, approximately how much did they run?

A. Oh, I would say two, three hundred. [336]

Q. Two to three hundred?

A. Around that.

* * * * *

Cross-Examination

By Mr. Mitchell:

Q. I hand you, Mrs. Ferry, Plaintiff's Exhibit 6, document dated September 29, 1931, relating to a lease signed by yourself and Mr. Ferry and your son James, and call your attention to the first paragraph, reading:

"Lease to cover Lots No. 1 to 9, inclusive, in Tract No. 6699, except the warehouse and garage and enough room for Jack Isbell for his building material business."

Do you recall what lease that was of Lots Nos. 1 to 9, inclusive? A. What lots?

(Testimony of Catherine B. Ferry)

Q. Yes. Who were the parties to the lease?

A. Well, I don't think I could recall any, because I met with Mr. Ferry and he was the business head of the firm, and he left whatever he got. [337]

Q. You signed it at his request, I assume?

A. Well, I was always with him when I signed anything, and he tried to explain it to me.

Q. Did he try to explain this to you, do you recall?

A. Well, I couldn't say that special one, but everything that he asked me and that I had to sign.

Q. Everything he asked you to sign he would try to explain it to you before you signed it? A. Yes.

Q. You testified yesterday, I believe it was, that at the time you left Crafton, Pennsylvania, Mr. Ferry had about \$14,654 as his worldly wealth at that time?

A. Yes.

Q. And that you had a conversation with him also concerning some statements which he made about a partnership agreement with you; that was about that time, was it?

A. Yes; just about. Well, when we were first married we had the first.

Q. I am referring to the 1909 conversation in Pennsylvania. You might have testified to that this morning. I ask you now whether he divided that \$14,654 and gave you half of it at that time by check or in cash.

A. Well, just by word, just by word. [338]

* * * * *

Q. Did he give you half of that money in cash at that time?

A. Well, I guess you would call it he did, when he said that half was mine. [339]

(Testimony of Catherine B. Ferry)

* * * * *

Q. Did Mr. Ferry at that time and place hand you one-half of the \$14,654 in cash?

A. I wouldn't say that he handed it to me.

Mr. Mitchell: I think I am entitled to a yes or no answer to that question, your Honor.

The Court: If she can answer it yes or no. Mrs. Ferry, did he give you \$7,000 some-odd in cash? Now, that is the question. A. No; he didn't.

The Court: All right; that answers that.

Mr. Mitchell: All right, that is all.

Q. Do you know whether any of that money was used to pay your transportation out to California?

A. Well, I would say yes.

Q. Had one of your children been born at that time, 1909? A. We had two.

Q. You had two children, and how old were they at that time? [340]

A. Three years and—let me see—and three months, one three years and one three months.

Q. Did Mr. Ferry have any custom or practice of charging half of those expenses to you and half of them to himself, or was all of that money used—

A. Well, it was ours.

The Court: Wait. Mr. Mitchell has not finished his question, so you will have to wait.

The Witness: Oh, pardon me.

Q. By Mr. Mitchell: Or, on the other hand, was any portion of that money used, at his discretion, to buy train tickets to California and buy clothes for you and the children and food and shelter?

A. Well, we could both do that.

(Testimony of Catherine B. Ferry)

Q. You both had power to spend that money to support yourself and the children, is that right?

A. Yes.

Q. That is, both halves of it, not just his half?

A. No; not just his half; both halves.

Q. Both halves. You testified also yesterday that Mr. Ferry received no inheritances and received no gifts during his lifetime. Is that also true of yourself, you received no gifts?

A. None whatever.

Q. After marriage and inherited nothing after marriage?

A. No. [341]

Q. You also testified yesterday concerning a period in your married life when you kept books and payroll records for Mr. Ferry in his business. What business was he in at that time?

A. Oh, he always had some contract.

Q. He was always in the contracting business?

A. He was always in the contracting business.

Q. Ever since you married him, I guess?

A. Yes.

Q. Until he ceased in 1929?

The Court: '35.

Mr. Mitchell: What was that?

The Court: '35.

Mr. Mitchell: No; I think he died in '35, and James testified that he ceased the contracting business in '29, but did continue after '29 in the rental equipment business.

Q. Just where was this business? By the way, what year was this that you kept books for him?

A. Oh, you mean since I came to California?

(Testimony of Catherine B. Ferry)

Q. No. I mean the time you testified to yesterday. You said, about 1919, but I would like to get that date a little more definite.

A. You mean the place where I kept the books, helped him keep his books?

Q. You testified yesterday that you kept books for him at some time and place. [342]

A. He always had his office in our home then.

Q. In 1919? A. Yes.

Q. And where was your home in 1919?

A. On Acacia Street in Glendale.

Q. Was it the year 1919 that you kept books for him?

A. Well, as far as I can remember, back even before.

Q. How did you happen—

A. Even before that I did.

Q. You did help him some with his books?

A. Yes.

Q. I am just wondering whether you meant that in 1919 you devoted all your time to keeping his books?

A. No; I didn't devote all my time, but he had contracts away, and then they would send me in—he also had contracts for the Southern Pacific Railroad and the foremen would send me in the data and I would make up the time and the checks.

Q. You would make up what?

A. I would make up the payroll and send him the checks.

Q. I see. How often was that done, once a week or once a month?

A. I think it was two weeks then, every two weeks.

Q. Every two weeks? A. Yes.

(Testimony of Catherine B. Ferry)

Q. You had a child born, William Francis, on July 21, [343] 1917, I believe. When was the next child born after 1917, William Francis?

A. That was Edward Paul. He was born 1920.

Q. 1920, what month? A. In October.

Q. October, 1920? A. Yes.

Q. By the way, the bookkeeping was done, and making out the payroll checks was done, at Mr. Ferry's request, I assume, is that right? A. Well, surely.

Q. What is that? A. Yes; I would say.

Q. And you did that for love rather than for any money that he might pay you, didn't you?

A. No; I wouldn't just say that. I was interested enough—

Q. What did he agree to—

Mr. Robinson: Oh, let her answer.

Mr. Mitchell: Excuse me. That is right. Go ahead.

A. I was interested enough to want to do it.

Q. I see. You did not ask for a salary or anything of that sort for doing that work? A. No; I never.

Q. And he did not offer to pay you anything for that work, did he, at the time? [344]

A. Well, I wouldn't say that, no; not that he paid me.

Mr. Mitchell: Will you read the answer, Mr. Reporter, please?

(Answer read by the reporter.)

Q. By Mr. Mitchell: You also testified that in 1925, at the time that the five trusts were created—you recall testifying to a conversation that you had with Mr. Ferry that, upon one of those occasions those trusts were all created at different times, but were all created, four of them, in 1925; and he said something about having

(Testimony of Catherine B. Ferry)

worked hard and putting something into writing that was oral, and that you should feel secure. I am not asking you what else was said, but I am asking you whether the security that he referred to was lifetime security, or security in case of his death.

Mr. Robinson: Object to the question as calling for a conclusion of the witness.

Q. By Mr. Mitchell: If you know.

The Court: If he said it.

Mr. Mitchell: From the conversation.

The Court: In that conversation, if he said anything to that effect that is proper.

Q. By Mr. Mitchell: Did he say anything about what he meant by "being secure"?

A. I wouldn't remember just—

The Court: Do you remember any words in addition to [345] what you already testified to?

A. No; I don't remember only what I have testified to.

Q. By Mr. Mitchell: You also testified yesterday concerning a trip you made with Mr. Ferry in 1932 up to Fresno to look at some property which he contemplated acquiring; and that he asked your advice concerning the desirability of purchasing that property and adding it to the other holdings. Do you recall that? A. Yes.

Q. What was the purchase price that he considered paying for that property?

A. Well, I wouldn't just remember and I never went into the higher figures.

Q. I see. The figures were pretty high, were they?

A. I wouldn't—

(Testimony of Catherine B. Ferry)

Q. You always left the amount of the purchase price of these matters to him, did you?

A. Yes. I had every confidence that he would take care of my part of it.

Q. I believe that you said that he always took you out to see real estate and asked your advice. Do you recall that? A. Yes.

Q. I call your attention to—

May I see Exhibit 1, please?

The Clerk: That is in the file. [346]

The Court: The stipulation of facts?

Mr. Mitchell: The stipulation of facts; yes.

The Court: All right.

Q. By Mr. Mitchell:—page 95, a portion of Exhibit K entitled "Private Trust No. 6204, Citizens National Trust and Savings Bank of Los Angeles, Peter L. and Catherine B. Ferry property in Los Angeles County, State of California," listing certain parcels of property. I call your attention to Parcel 1, "The East three and three-quarters acres of the West five and three-quarters acres of Lot Thirty-seven of Watts Subdivision of part of the Rancho San Rafael,"—

Mr. Robinson: May I ask a question on voir dire?

The Court: Yes.

Mr. Robinson: Do you understand legal descriptions?

A. No; I don't understand them.

The Court: Can you identify the property, Mr. Mitchell, in some other way?

Q. By Mr. Mitchell: Do you know where Rancho San Rafael is? A. That is in Glendale.

(Testimony of Catherine B. Ferry)

Q. Where in Glendale? Do you know where Watts Subdivision is, then, in the Rancho San Rafael in Glendale?

A. Well, I used to know them all, but I can't say that I—

Q. You do not recall going with Mr. Ferry to look over that $3\frac{3}{4}$ acres of land before it was purchased, do you? [347]

* * * * *

A. I couldn't say. I know I went with him a lot, but I just don't know the different subdivisions.

Q. You do not recall either he or you receiving a deed to that property, do you?

A. No. We had several deeds but I couldn't say what. [348]

* * * * *

Mr. Mitchell: It is quite a long description, your Honor.

It is $3\frac{3}{4}$ acres and it was acquired—I will give you the date of its acquisition, Mrs. Ferry—it was acquired on October 27, 1925, from a man named James Quinn, a single man, and reading from page 18. Does that refresh your memory? A. No; it doesn't.

Q. October 27, 1925. Now, I will call your attention, then, to item 2 on page 97 of the stipulation of facts, "Lots 18 and 19 in Block 4 of Tract 8842, as per" a certain map. That parcel, too, was acquired—I am still reading from the stipulation of facts—from the Security Trust and Savings Bank on the 2nd day of November,

(Testimony of Catherine B. Ferry)

1925. Do you remember inspecting that property with Mr. Ferry?

A. Well, they all sound familiar to me, but I just can't place the different properties there.

Q. These are all in Los Angeles County.

Let us take "Lots 3, 10, 11, 12 in Tract 7319." This is Parcel 5. Let us take Parcel 4. Excuse me. "Lots 1, 2 and 3 in Block 1 of Borthicks Tracts." Did you ever hear of Borthicks tract? A. That is in Glendale.

Q. That is in Glendale. Do you recall inspecting any [349] property, or those three lots or any other lots in Borthicks Tract before they were purchased?

A. Well, yes; I do but I wouldn't just remember different ones.

Q. But you do remember the one in Fresno?

A. Yes.

Q. That is the only one you can remember and identify?

A. I wrote these many the time, and I am sorry to say that I just can't place where they are.

Q. I have 38 pieces of real estate described here and, of course, that is only a portion. This is the property that went into Trust 6204. This Parcel 4 of the Borthicks Tract, according to the stipulation of facts, was purchased from or acquired from the former owners, William Griffin and Fannie Griffin. Does that refresh your memory at all? A. Yes; I knew of them.

Q. What is that?

A. Yes; I knew all those people. [350]

* * * * *

Q. I will ask you whether you ever were shown those lots in Parcel 4, Lots 1, 2, and 3, by either Mr. William

(Testimony of Catherine B. Ferry)

Griffin or Fannie Griffin, or were you taken to look at them by your husband?

A. Well, as I said, he had taken me many the time to look at them, but I just don't remember the lot numbers.

Q. You can't recall that. You can't recall the purchase price, if any, that was paid for them in 1922, April 12th?

A. No. [351]

* * * * *

The Witness: I will put on my glasses.

Q. Oh, yes, please.

I will ask you to start with 5 and go on through Parcel 24 on line 26 of page 22. I will just put a little mark here and ask you to start with page 18, line 24, beginning with Parcel 5 and ending on page 22, line 26. That is through Parcel 24. And ask whether you recall—or give us the name of the former owner of the property in each of those paragraphs in respect of each parcel, and ask you whether you recall accompanying your husband to inspect any of those parcels at the dates that appear there, on the dates that appear. [352]

* * * * *

Mr. Mitchell: Any date that approximated that time, presumably before that time. I am calling her attention to the date so that it might help her.

A. Well, I remember this Bert Perry.

Q. What parcel is that; the number, please?

A. That is Parcel 7.

Q. 7.

A. Oh, wait until I see. No; that is Parcel 6.

(Testimony of Catherine B. Ferry)

Q. Parcel 6, page 19, line 7, Bert Perry and Anna Perry? A. Yes.

Q. That was about December, 1932? A. Yes.

Q. And where is that property located?

A. That is located in Glendale.

Q. How many lots did you look at at that time or do you recall? A. I wouldn't recall.

Q. Do you recall whether that property was purchased outright or whether it was acquired by virtue of a mortgage or a trust deed foreclosure? [353]

A. I think, if I remember right, it was a foreclosure.

Q. Just continue to examine them and see if you recall any more.

A. This No. 20 (page 20), Percy Hayselden.

* * * * *

Q. Oh, that is page 20, line 19, Parcel 13. All right. Do you recall where that property was situated?

A. That was in Glendale and the Verdugo Woodlands.

Q. Do you recall how many lots it consisted of?

A. I think it was just one lot.

Q. You recall these people, do you, or do you recall a trip to the property? [354]

A. I know the people and I also was at the property.

Q. When? A. That would be about 1931 or '2.

Q. How did you happen to go to the property?

A. Well, I think they owed us a debt and we went up to look to see if we would take it for the debt they owed us.

Q. You went to collect some money on a mortgage note, perhaps, or something like that, do you mean?

A. It was some money that they—some money that they owed us.

(Testimony of Catherine B. Ferry)

Q. It was not a trip with your husband to inspect the property with a view to buying it, was it?

A. Well, to take it in place of this debt.

Q. You went alone to collect money, or did you go with Mr. Ferry?

A. I went with Mr. Ferry to look at the lot.

Q. Did Mr. Ferry consult you before that loan was made to the Hayseldens? A. Yes; he did.

Q. When and where did that take place?

A. In Glendale.

Q. How much was the amount of the loan?

A. If I remember right, I would say around two or three hundred dollars.

Q. And when was it that Mr. Ferry discussed it with you? [355] A. Well, around that same time.

Q. What time was that?

A. Well, as near as I would say, 1932.

Q. There are two that you recall. Do you find some more?

A. Well, they are all—I remember the names and all, but I just can't place, because we had all the deeds.

Q. My thought is whether you can remember making any trips to these pieces of property on or about the dates that appear there. Just take your time. I don't want to rush you at all. [356]

* * * * *

Q. I will change the question, Mrs. Ferry, and ask you whether you recall inspecting with Mr. Ferry any property owned by the persons named in these paragraphs

(Testimony of Catherine B. Ferry)

— think you understood that, didn't you?—these former owners?

A. Yes; but I have forgotten the names. I know I went with him many times but I can't place the names.

Q. Can you remember any particular one outside of the trip to Fresno?

A. There is one here, the Twin Lakes Park.

Q. Twin Lakes what? A. Twin Lakes Park.

Q. Twin Lakes Park? A. Yes.

Q. What is the number of that one, please?

A. Parcel 34.

The Court: The page? A. Page 23.

The Court: Page 23, Parcel 34.

Mr. Mitchell: Twin Lakes Park Company; that was a corporation. I see.

The Court: Do you remember going to see that property, Mrs. Ferry?

A. Yes; I remember of going.

Q. Any other details about it, the purchase price or anything of that kind? That is what counsel wants.

A. Well, I don't remember the purchase price. I was [357] busy with my household and I just left the purchase price always to Mr. Ferry.

Q. By Mr. Mitchell: Where was that property located, in Los Angeles County? A. Yes.

Q. Whereabout in Los Angeles County?

A. Up around Twin Lakes.

Q. Oh, yes. Do you remember whether that was a foreclosure or subdivision? A. No.

Q. Trust or something of that sort?

A. It might have been gotten with the intention of a subdivision, but I am not sure.

(Testimony of Catherine B. Ferry)

Q. You do not recall the source of the money that went to pay for the property, do you? [358]

* * * * *

The Court: Before we take our recess until tomorrow morning there are one or two questions.

Mrs. Ferry, for instance, I have before me the Exhibit No. 44 introduced by Mr. Robinson and, for instance, down in 1933, for each month of '33 and '34 and '35, checks, by this statement, were issued to you for various amounts. That is [359] in Trust No. 4358.

Mr. Mitchell: Which trust, your Honor?

The Court: 4358.

Mr. Mitchell: Oh, yes.

The Court: Those checks were issued to you. What did you do with them when you got those checks?

A. Do you mean from the trust?

The Court: Yes; the checks that were issued to you. Now, what did you do with them when you got them?

A. Always deposited them.

The Court: Endorsed them, did you? A. Yes.

The Court: And deposited them where?

A. In the banks. I never had a separate account.

The Court: So you put those back into the account of yourself and who else, your husband?

A. And my husband.

The Court: Is that true of all these checks you got?

A. Yes.

The Court: Never cashed any personally?

A. Never cashed any. [360]

* * * * *

Los Angeles, California, Friday, June 4, 1943.
10:00 a. m.

* * * * *

NATHANIEL N. EDDY,

called as a witness on behalf of plaintiff, being first duly sworn, was examined and testified as follows:

The Clerk: Your full name, please?

The Witness: Nathaniel N. Eddy.

Mr. Mitchell: I presume that the questions should be asked by plaintiff's counsel.

The Court: Proceed.

Direct Examination

By Mr. Robinson:

Q. What is your name?

A. Nathaniel N. Eddy. [362]

Q. What is your occupation?

A. Internal revenue agent, of the Treasury Department.

Q. In connection with your occupation did you do any work on this particular matter involved herein, the estate of Peter L. Ferry?

Mr. Mitchell: I will stipulate that Mr. Eddy, this revenue agent, audited the return and recommended the deficiency in 1937.

Mr. Robinson: I will accept the stipulation.

Q. I show you a letter dated January 25, 1937, and ask you if you have seen that before? That is Exhibit No. 59 in evidence.

A. Yes; that is a letter signed by me.

(Testimony of Nathaniel N. Eddy)

Q. May I ask you, on Trust No. 2012 of Citizens National Trust and Savings Bank, at what figure you included that trust in the gross estate in this matter?

A. It was included in the sum of eighty-two thousand—

Mr. Mitchell: Now, just a minute. I just want to object to the form of the question. This witness did not include anything in the gross estate, but proposed the inclusion of certain things by this letter and the inclusions were made by the Commissioner, his superior officer.

Mr. Robinson: I will insert the word “proposed” in that connection.

A. I recommend the sum of \$82,289.16.

Q. That is for which trust? [363]

A. That is for Trust No. 2012, Citizens National Trust and Savings Bank.

Q. Was that the same figure that was in the Leslie report, Exhibit for identification No. 60? A. No.

Q. What is the difference between the Leslie report and that report?

A. The difference applies to certain accrued interest on notes, as I recall, a few of the notes interest was not included in his report and I included the full amount.

Q. Do you know whether or not the sum of \$46.02, being income cash on hand, was proposed to be included by you in that figure? A. It was.

Q. Under Trust No. P-1052, Title Guarantee and Trust Company—

The Court: I did not get the number.

Mr. Robinson: P-1052, of Title Guarantee and Trust Company. I believe you have it there as “1050”, Mr.

(Testimony of Nathaniel N. Eddy)

Eddy, in your letter. What figure did you recommend as for inclusion in the gross estate on that trust?

A. On Trust No., as I have it, "P-1050", Title Guarantee and Trust Company—

The Court: 1050? A. That is correct.

Mr. Robinson: There was an error in the letter. It is [364] "1052". It is a typographical error.

Mr. Mitchell: 1052 or 1058?

Mr. Robinson: 1052 is the trust in issue. Mr. Eddy, apparently through a typographical error, returned it as "1050".

The Court: All right, just so it will be all straight.

A. The total amount recommended was \$126,604.80.

Q. Was that the identical figure used in the Leslie report? A. No.

Q. Can you tell me if the sum of \$1,749.56, as set forth in the Leslie report as being "income-cash on hand" was recommended by you to be included and was in that figure?

The Court: Just a moment, off the record:

(Short intermission.)

Mr. Robinson: What is your answer, Mr. Eddy?

A. Yes.

Q. Were each and all of the items of accrued interest as set forth in the Leslie report on each and all of these trusts recommended to be included by you in the gross estate included in those two figures that you have mentioned? A. Yes.

The Court: Mr. Reporter, will you read the answer, the last question and answer?

(Record read by the reporter.)

(Testimony of Nathaniel N. Eddy)

Q. By Mr. Robinson: On Trust No. 5869 at what figure [365] did you recommend the inclusion of that trust in the gross estate? A. The question?

Q. At what figure did you recommend the inclusion of that trust in the gross estate? A. \$108,363.36.

Q. Did you include in that figure the accrued interest as set forth on pages 1, 2, 3, and 4 under the title "Trust No. S. 5869" in the Leslie report that I have here, that is, interest and/or accrued interest? A. Yes.

Q. Calling your attention to Trust No. 1080 Title Guarantee and Trust Company—

The Court: What was the amount recommended there?

Q. By Mr. Robinson: —at what figure did you recommend the inclusion of that trust?

The Court: Trust No. S-1080?

Mr. Robinson: Right.

A. \$2,547.74.

Q. And that was for a one-tenth interest in the trust?

A. Right.

Q. Calling your attention to Trust No. 6204—I withdraw the question there. Apparently there was no accrued interest in that trust.

Calling your attention to Trust No. SS4358 of Security-First National Bank of Los Angeles at what figure did you [366] recommend the inclusion of that trust in the gross estate?

A. There are two trusts of the same number, one numbered SS4358 and one numbered SS4358-A, combined make a total of \$95,182.02.

Q. In that figure did you include the items of interest and/or accrued interest as set forth on pages 1

(Testimony of Nathaniel N. Eddy)

to 5, inclusive, of the Leslie report under the head of "Property in Trust No. SS4358, Security-First National Bank of Los Angeles"? A. Yes.

(Duplicate questions concerning Trust No. 2012 were physically stricken from the record by the court.)

Mr. Mitchell: You have covered about seven trusts and there are only four involved.

The Court: But the witness here stated, for the first time, that there were two trusts that we have been referring to as "4358". He said "4358 and 4358-A" are two trusts combined.

Mr. Mitchell: I see. That would make 5, instead of 4, but I don't know how many he has testified to. It is certainly more than 5, if I remember correctly.

The Court: We have six testified to.

Mr. Robinson: That is right.

The Court: And you say there are only five?

Mr. Mitchell: There are only five; that is right.

The Court: We have six testified to. We have Trust No. [367] 2012, Trust No. 1052, 5869, 1080, 6204, in which there was no interest accrued, 4358 and 4358-A.

Mr. Mitchell: That is right.

The Court: All right.

Mr. Robinson: That is all.

Mr. Mitchell: May I say, your Honor, my answers to your Honor's questions yesterday go to distributable income and won't change my personal opinion that I expressed at that time, that there are so many new points have been added to this case since the trial started that I simply lost track of the main issue, which is whether or not these trusts are includable, because revocable, and

(Testimony of Nathaniel N. Eddy)

because the powers to amend and revoke and change beneficiaries, and so on, were retained by the donor, whoever the donor was. It makes no difference, of course, whether the gift consisted of corpus or income if the gift was not complete. The retention, of course, of the right to revoke and of the right to change beneficiaries makes the gift incomplete until it is completely surrendered to the donee, the donee being the beneficiaries in most of the trusts but one, and as long as the trustee has in his possession income from the trust corpus that has not been irrevocably transferred to the ultimate donee, the beneficiaries of the trust, that gift is not complete and the income is includable just the same as the corpus.

Our only objection, of course, is to the raising of this point at this time when it was not raised in the refund claim, [368] but it is certain the income, undistributed income, is considered the same as corpus for tax purposes in a situation such as this. The only and ultimate issue that your Honor will be called upon to decide and determine is who made the gift. Plaintiff is not contending that the trusts were not revocable. They speak for themselves. The question is who made the gift. Did the husband make the gift to the extent of 100 per cent, or did he make the gift to the extent of only 50 per cent? That is the chief issue in the case.

Of course, the refund claim contention is made on the ground that there was a property settlement agreement in 1925, when the four first trusts were created, growing out of the conduct of the parties in creating the trusts. Theories are now raised in the trial that, whether or not there was a property settlement agreement at the time of

(Testimony of Nathaniel N. Eddy)

the creation of the trusts consisting of conduct of the parties, there was partnership agreements between the spouses, all of which merely goes to the question, assuming that your Honor is correct in permitting that issue to be raised now—that all goes to the question of who made the gift, irrevocable gift. Who made it? Did the husband make it alone or was it made by the husband and wife jointly? Was it the property of both of them at the time?

The contention heretofore has been that it was old type community property because it was acquired during marriage and that it was transformed into a tenancy in common by a [369] property settlement agreement at the time the trusts were created, that, of course, being the original. [370]

* * * * *

Mr. Robinson: At this time, your Honor, I would like to offer into evidence the testimony of the witness Martell, which testimony was admitted for a limited purpose, solely for computation, I believe—testimony to the effect that in Trust No. P-1052, the Title Guarantee and Trust Company, on June 16, 1935, there was income cash on hand in the sum of \$1,749.56 available for distribution.

Mr. Mitchell: There is no objection to that, your Honor, assuming that the amount corresponds with what the witness just testified to and that the Commissioner actually included it in fixing the gross estate.

The Court: It is so understood.

Mr. Robinson: At this time I offer into evidence Exhibit No. 60 which is in for identification purposes now. [371]

* * * * *

(Testimony of Nathaniel N. Eddy)

Mr. Robinson: Counsel, if I limit it solely in explanation of the testimony just given by Mr. Eddy? That is the sole purpose for which I am including it, to show which items include accrued interest and accrued income that were recommended to be included by him.

* * * * *

The Court: My understanding yesterday was that Mr. Eddy had access to, and in making up his report to the Government, used the inheritance tax appraiser's report which was filed in the Superior Court of Los Angeles County and it was made by this particular tax appraiser, Mr. Leslie. If that is correct, counsel, you can recall your witness and go further into the report and put whatever figures he used and referred to in making up his report into the record. [372]

* * * * *

The Court: I have limited it, Mr. Mitchell, I have limited it to just the portions that your expert used and relied upon, or used at the time of his making up his report, and nothing else. That is why I said that. [373]

* * * * *

Mr. Mitchell: I have no objection to that.

* * * * *

Q. By Mr. Robinson: Mr. Eddy, I hand you herewith Exhibit No. 60, the report of inheritance tax appraiser, and ask you if you have ever seen that particular document that you have in your hand before?

A. I either saw this or one apparently like it. That is all I can say.

(Testimony of Nathaniel N. Eddy)

Q. Do you know if this is the same document that you used? A. I could not say that.

Q. You could not say the same one? [374]

A. No; I could not say the same one at all.

Q. Calling your attention to Trust No. 5869 of Security Trust and Savings Bank, I will ask you what was the total amount, as you have it, of interest and/or accrued interest which you recommended be included in the gross estate in this matter?

Mr. Mitchell: I think this is all a waste of time, your Honor, because the amount that was included in the gross estate by the Commissioner is not questioned in any way, shape or form. I will stipulate that if there was any accrued income that it was included, because the trusts were revocable.

The Court: Not "if there was any", but the sworn testimony of this witness is that there was.

Mr. Mitchell: That there was and that he recommended its inclusion.

The Court: That is right.

Mr. Mitchell: I will stipulate that that is the instruction, the implicit instructions of the Commissioner to all revenue agents when there is a revocable trust, to include any accrued income. I mean any cash received that has not been distributed, because the gift is not complete until it is surrendered. Any time before the income is transferred to the beneficiary, the donor-trustor can revoke or change it and change his beneficiary before it is received. It is customary, and it is not questioned and I don't think the [375] plaintiff questions that. I don't know what his purpose is, unless he is going to contend and raise another issue to the effect that that cash received and distributable was vested in certain beneficiaries

(Testimony of Nathaniel N. Eddy)

and therefore should not have been included. If that is the purpose of this testimony we object to it on the same grounds that we have heretofore made to the effect that it is not supported by the refund claim. There is no hint in the refund claim that any portion of the property and values included in the gross estate belong to someone other than either the plaintiff or the decedent. [376]

* * * * *

Q. By Mr. Robinson: Mr. Eddy, as to Trust No. S-5869, Security Trust and Savings Bank, do you know how much you [379] included as accrued interest and interest in that trust?

Mr. Mitchell: I object to any further questioning on that point, your Honor.

The Court: Overruled. Proceed. Let us get some of this evidence in.

Mr. Mitchell: On the ground that I have just stated to your Honor, that that question is not involved in this case.

The Court: Proceed.

The Witness: Pardon me, what trust was that, number what?

Mr. Robinson: 5869.

Mr. Mitchell: If the court please, I hate to interrupt so much and object so much, but I think that counsel for plaintiff should state the purpose of this questioning; and if that purpose is as I stated it, it is wholly inadmissible.

The Court: I do not think that counsel is compelled to state his theory to opposing counsel when he is offering evidence.

(Testimony of Nathaniel N. Eddy)

Mr. Mitchell: I am not asking him to state it to counsel. I think the court should ask him for the court's information, to determine whether or not it is admissible.

The Court: I want to get all the facts in the case and then I will make my determination. I can't do it without all the facts. And then I will have time to study the briefs of counsel and try and arrive at a decision that I think is correct. [380]

Mr. Robinson: Mr. Eddy said that if he had a little time he could sit down and save the court's time by going through the report and making a recapitulation of it.

The Court: All right.

Mr. Mitchell: I might say, your Honor, that I sent a wire this morning to Washington and asked that a complete original administrative file, which will contain Mr. Eddy's report on every item that is included, be sent, and that might save some time, if the court thinks that all evidence must go in whether admissible or not. That should get here before Tuesday. It is obvious now that we can't complete the trial of the case today. And I sent the message straight through and it has already been received.

The Court: I do not think that this court is going to carry out the suggestion of counsel, or I do not ever intend, Mr. Mitchell, to say that all evidence, whether admissible or not, is going to be admitted.

Mr. Mitchell: I apologize, your Honor.

The Court: I don't think that remark should have been made to this court.

Mr. Mitchell: I apologize to your Honor.

The Court: But I can't determine these questions without evidence, some of which is very close to the line, without knowing finally what the theory of it is. They

(Testimony of Nathaniel N. Eddy)

have advanced several theories and you have advanced several theories, and I think the court is entitled at least to the [381] facts, and then when the proper time comes to determine what is relevant and competent, and the court will exclude from its consideration whatever evidence it finds, under the theory of the case that it adopts, is not material. That is the only thing I can say. You may leave the stand. [382]

* * * * *

NATHANIEL N. EDDY,

recalled as a witness on behalf of defendant, having been previously duly sworn, was examined and testified as follows:

The Court: Let the record show that I have inserted the words suggested by plaintiff's counsel after the word "corpus". I have inserted the words in the original second amendment to the complaint on file: "and income available for distribution" at page 2, line 21.

Direct Examination

By Mr. Mitchell: [383]

* * * * *

Q. By Mr. Mitchell: How long have you been in the Internal Revenue Agent's office?

Mr. Robinson: I will stipulate that Mr. Eddy has been there for a great number of years and is one of the high-ranking men in the department.

Mr. Mitchell: Good.

The Court: All right, proceed.

(Testimony of Nathaniel N. Eddy)

Q. By Mr. Mitchell: What is the procedure in connection with the audit of estate tax returns?

A. Upon assignment of a case—

Q. By whom, assignment by whom?

A. By the group chief of estate tax, we are given Form 706—

Q. Which is the estate tax return?

A. Which is the estate tax return filed by the executor; and we are given carte blanche to verify all items, make full investigation of any transfers or items not revealed, or otherwise, that we may come in contact with by thorough search of records, court records. Court records, of course, are always first looked into—the probate records I mean by that—and verify all deductions. In [384] other words, made a complete audit from beginning to end of that return.

Q. Of both properties reported in the return as well as deductions? A. Right.

Q. Do you ever make inquiry as to property that is not reported in the return? A. Yes.

Q. And if you find any, you include it in the gross estate? A. Yes.

Q. In your recommendation and report?

A. Yes.

Q. After you have completed that investigation—does that investigation ever include consultations with counsel for the executor or executrix of the estate?

A. We always contact counsel about the first to run through preliminarily their schedule, every schedule and item, to get what data he may be able to furnish us that is not fully detailed in the report. Yes.

Q. Does the investigation also include consultations with the executor or executrix, himself or herself, as well

(Testimony of Nathaniel N. Eddy)

as any other relatives if you think they have any material knowledge or information that might be helpful?

A. Yes; we do.

Q. Was that practice followed when you audited Form [385] 706 in the Peter L. Ferry Estate?

A. It was; yes, sir.

Q. And when was that done, Mr. Eddy? You are referring to what to refresh your memory?

A. I am referring to my report which was dated January the 25th, 1937. It is my personal report. The investigation was made, of course, prior to that date.

Mr. Robinson: May I see the report, please?

Mr. Mitchell: This report, Mr. Robinson, is the one you referred to when you were examining him before he gave his answers.

(Counsel examining papers.)

Mr. Mitchell: Has counsel satisfied himself that the witness can refresh his memory from this memorandum?

Mr. Robinson: I will have no objection to it.

Mr. Mitchell: All right; let us proceed, then.

Mr. Robinson: Just a second.

Mr. Mitchell: This is about 20 pages long, your Honor. We are going to introduce the original official record into evidence before the case is over. Do you think it is really necessary that counsel stop to read this 20-page memorandum of the witness, who is only using it to refresh his memory?

The Court: The only purpose, counsel is now examining it so that if he wants, he can question the witness on voir dire to find out whether or not this is his report and whether or not these are his handwritings and figures. [386]

(Testimony of Nathaniel N. Eddy)

Mr. Mitchell: If counsel wants to do that I have no objection to it.

The Court: That is the only purpose of submitting it at this time to counsel, because there is no question before the court for any ruling.

Mr. Mitchell: Counsel requested to see it and is still examining it. It seems to me that it is—

* * * * *

Mr. Robinson: May I ask a question on voir dire?

The Court: Yes.

Q. By Mr. Robinson: Mr. Eddy, each and all of the typewritten pages herein contained, were they made by you or under your direction and control?

The Court: What is the number of this exhibit?

Mr. Mitchell: It is not an exhibit. It is notes belonging to the witness, your Honor.

A. Either typed by me or at my direction from data obtained in the field.

Q. By Mr. Robinson: Is all the handwriting contained therein your handwriting? A. No.

Q. Whose handwriting is contained in there besides your own? A. Probably the reviewer. [387]

* * * * *

Mr. Mitchell: Will you find the last question and answer, please, Mr. Reporter?

(Record read by the reporter as requested.)

Q. By Mr. Mitchell: Mr. Eddy, the assignment was made, of course, also prior to that date?

A. Yes. Probably within 60 days prior.

Q. Now I hand you a certified photostatic copy of Plaintiff's Estate Tax Return marked Plaintiff's Exhibit

(Testimony of Nathaniel N. Eddy)

2 and call your attention to page A-15 in the lower right-hand corner. I will ask you to refresh your memory and read that page. It relates to insurance under Schedule C-2.

The Witness: Schedule C-2?

Q. Yes. [388]

The Witness: Page 4?

Q. Page A-15.

The Witness: A-15, yes. Well, I was reading at the top of the page.

"Insurance.

"The entire estate and property of decedent is community property, having been acquired in the State of California since the marriage of decedent and his wife, Catherine B. Ferry. From the value of the policies there has been eliminated the proportionate interest of Catherine B. Ferry, based upon the portion which the total premiums bear to the premiums paid since July 29, 1927. Where the policies have been payable in installments or for a period of years the policies have been valued according to tables set forth in Regulations No. 80.

"(The date of birth of Catherine B. Ferry was June 12, 1884.)"

Q. Now I will ask you whether you investigated that portion of the return. I mean the—

The Court: I did not get that question, Mr. Mitchell.

Mr. Mitchell: I will change it.

Q. I mean by that, the contention made in the return that the premiums were paid in part by community property of the spouses acquired since July 29, 1927.

If the court please, in explanation, while he is looking [389] for that data, I have not had time to go over this

(Testimony of Nathaniel N. Eddy)

with the witness and that is the reason I stated at the outset it might take a little time.

The Court: May I see the file, Mr. Mitchell, if you are not using it?

Mr. Mitchell: Yes, your Honor.

Mr. Robinson: Mr. Mitchell, would you care to offer into evidence Mr. Eddy's entire notes?

Mr. Mitchell: Oh, no. We will offer later the official files of the revenue agent's office.

The Witness: Please read the question again.

(Question read by the reporter.)

A. That was a conclusion, a conclusion of it set forth in the return which is subject to proof by the executrix: and I made no attempt to verify that conclusion because it is a burden upon the executrix to furnish proof that it was so paid out of community property or after those dates: and I have no data, was given no data at the time of my investigation. [390]

* * * * *

A. I did include the insurance in the gross estate as taxable.

Q. By Mr. Mitchell: Why?

* * * * *

A. Because it was included under the regulations of the Code.

Mr. Robinson: I object to that as being a conclusion of the witness as a matter of law.

The Court: That was the reason he put it in, counsel. Whether it is good or bad, that is the reason he did it. Objection overruled.

(Testimony of Nathaniel N. Eddy)

Q. By Mr. Mitchell: Mr. Eddy, did you give the estate, counsel for the estate or the executrix an opportunity to produce any evidence that some of the premiums were paid with this new type community funds? When I refer to "new [391] type community funds" I mean community of the type acquired after July 29, 1927.

The Court: I think that is a conclusion, counsel. He can state the facts. I don't think the witness would have a right to say "Yes" on that.

Mr. Mitchell: Giving them an opportunity?

The Court: Yes. That would be his conclusion. What he did, if anything, I think that would be proper; but it is not for him to say "Yes; I did."

Q. By Mr. Mitchell: Did you do anything or have any conferences with counsel for the plaintiff, tax-debtor, the executrix, or with the executrix or any member of the family of the executrix concerning that question?

A. Yes. Many requests were made of the attorneys representing the estate.

The Court: Who were they?

A. The firm of Claude I. Parker.

Mr. Mitchell: No. Now, wait a minute, Mr. Eddy. Claude I. Parker were not attorneys for the estate in 1937.

Mr. Robinson: Mr. Mitchell, I don't want you to testify in this matter.

The Court: That is just a correction, counsel, that may be designated if the witness is in error. All right. The estate attorneys he is talking about now, Mr. Eddy.

A. Yes. Freston & Files were the attorneys for the estate at the time a request was made in the usual manner for [392] any proof of a claim that it was community

(Testimony of Nathaniel N. Eddy)

interests of the survivor, the beneficiary under these policies, and none having been received and—

Mr. Robinson: Mr. Eddy, can you speak a little louder? We can't quite hear you.

A. —and none having been received, I, of course, rejected the claim for deduction for any community interest.

Q. By Mr. Mitchell: Now I will call your attention to Schedule E. Schedule E of the Estate Tax Return, Plaintiff's Exhibit 2, page A-22 in the lower right-hand corner, which sets forth a list of trusts, and particularly this portion of page A-23, the middle paragraph, beginning:—

“The aforesaid trusts were not created as part of any testamentary disposition or scheme whatsoever, and were not intended to avoid or evade any taxes whatsoever. The decedent furthermore desired to and did by the creation of these trusts”—

The Witness: Just a moment. I haven't found that yet.

Mr. Mitchell: The middle of page A-23.

The Witness: A-23?

Mr. Mitchell: A-23. Do you find the paragraph beginning “The aforesaid trusts”?

The Witness: I have it.

Mr. Mitchell: In the second sentence:

“The decedent furthermore”—do you find that? [393]

The Witness: Yes.

Mr. Mitchell: —“desired to and did by the creation of these trusts enter into a property settlement with his wife and widow, Catherine B. Ferry, to protect her and himself against any right which she had or might have in his property and to constitute a final settlement with

(Testimony of Nathaniel N. Eddy)

her for her benefit, in the sense that she would always be independent and have the protection which trusts afford, for the benefit of his children for similar purposes, and for his own benefit so that his property would be free and clear of any claims of his wife. It is therefore contended that all of the transfers by Catherine B. Ferry and Peter Ferry, deceased, constituted executed gifts *inter vivos*."

Did you investigate that question?

A. By contact with the attorneys, to furnish any proof of this statement, and none having been furnished me, any claim of that type was denied.

Q. I will call your attention to page A-24 of Plaintiff's Exhibit 2. Do you find that? A. Yes, sir.

Q. "It is further contended that the interest retained by Catherine B. Ferry in the trusts hereinbefore set forth was not transferred to her by decedent but represents the community property [394] acquired by decedent and Catherine B. Ferry since their marriage."

Did you investigate that question?

A. Yes. I interviewed Mrs. Ferry, Mrs. Catherine B. Ferry, and others of the family relative to date of marriage and as to whether she had contributed anything to the trusts, and as to the decedent's business and his time he retired and whether Mrs. Ferry had contributed anything to the estate corpus.

Q. You spoke, you say, to Mrs. Ferry?

A. Yes.

Q. Where did that conversation take place?

A. In her home in Glendale.

Q. What was the conversation?

A. Well, I asked her about one thing, one of the main things I went out there for, was relative to the furniture in the home and to appraise it; and I asked her

(Testimony of Nathaniel N. Eddy)

about the acquisition of that furniture and she said that it was purchased by the decedent; and that she left everything to him; that she did not contribute anything to that and that she had no separate property of her own; that she never inherited any property, nor did the decedent; and that was the testimony.

Q. You were then investigating the trusts, the question also regarding the trusts? A. Yes. [395]

Q. Did you go into the question of a property settlement agreement as of the date of the creation of the trusts in 1925? A. No; I don't think I did.

Q. What were your instructions concerning community property acquired before 1927?

A. They have no bearing on the case with the federal government, any community property acquired before July 29, 1927, under regulations.

Q. What do you mean by "no bearing," Mr. Eddy?

A. Well, they are not recognized as community property under the federal law.

Q. Suppose it is acquired during marriage, the property is acquired during marriage before 1927; you mean by that, that such property is treated as belonging only to the husband for tax purposes?

The Court: Counsel, this is your witness and I think he ought to explain what he means.

Q. By Mr. Mitchell: Are you a lawyer, Mr. Eddy?

A. No; I am not a lawyer.

Q. Did you ever hear of community property prior to 1927?

A. Yes. I think I can explain. I can give you an answer to what you want there.

(Testimony of Nathaniel N. Eddy)

Mr. Robinson: Pardon me. I would like to have it proceed by question and answer. I object upon that ground. [396]

Q. By Mr. Mitchell: Will you please testify to what I want, Mr. Eddy?

Mr. Robinson: I object to the question as incompetent, irrelevant and immaterial, and not proceeding in the proper manner.

Mr. Mitchell: I am asking you to explain your previous answer, of course.

The Court: Yes.

A. Before July 29, 1927, our office disregards property acquired before that date as being vested in the wife, or she has a vested interest in property acquired before that date.

Q. By Mr. Mitchell: Acquired during marriage before that date, do you mean?

A. That is right. And, if I may say, it is recognized, of course, by the State of California from the time of marriage. but after July 29, 1927, only the income after that date is considered community property.

Q. You mean those are your instructions?

A. That is right.

Q. This point here, that his entire estate—I am still reading from A-24—

“That his entire estate is derived entirely from his earnings and savings while in the contracting business.”

Did you look into that matter? [397]

A. That, again, comes under that statement I made before. I asked for some proof that it was community property after that date and none was furnished me.

(Testimony of Nathaniel N. Eddy)

Q. What investigation did you make, if any, regarding this property settlement by creation of the trusts?

A. That involves the matter of community interests, as I understand it, and it was out. I could not consider it because it was presumed to be contribution of her community property, and since that property was all acquired before July 29, 1927, she had no interest.

Q. Even though there had been a property settlement agreement between the spouses in 1925 you mean?

A. I never saw any such agreement.

Q. I am calling your attention again to the statement on page A-23.

A. A-23?

Q. Yes. A-23, the middle paragraph, beginning with the second sentence:

"The decedent furthermore"—

Do you find that?

A. Yes.

Q. "The decedent furthermore decided to and did by the creation of these trusts enter into a property settlement with his wife and widow, Catherine B. Ferry,"—

Did you investigate that or give that any consideration?
[398]

A. Only to the extent that there was no proof submitted that that was the fact.

Q. Other than the trusts themselves you mean?

A. That is right.

Q. I ask you whether—

I guess counsel will stipulate that copies of the trusts were attached to the estate tax return?

Mr. Robinson: You have so told me, so I will take your word for it.

Mr. Mitchell: All right.

The Witness: They were.

(Testimony of Nathaniel N. Eddy)

Mr. Mitchell: They are not attached to this copy, however.

Q. At this time and during this investigation did counsel for the executrix in answer to your questions tell you that Mr. Ferry and his wife entered into a partnership agreement at the time of their marriage?

Mr. Robinson: Just a minute. I object to that. There has not been a proper foundation laid for conversation.

The Court: And also, it is not proper direct testimony. That is cross examination. Sustained.

Q. By Mr. Mitchell: Did you testify that you had a conversation with an attorney in the office of Freston & Files in connection with your audit of Form 706, Exhibit 2?

A. I don't recall the conversation, but in making the investigation those matters—every item is discussed right [399] through. I don't specifically recall anything that may have been said.

Q. Did you discuss with them the contention which you have just read, that there was a property settlement agreement between the spouses at that time?

Mr. Robinson: Object to the question as leading and suggestive, not proper direct examination.

The Court: No; it is not. It is just asking him if he discussed that subject matter. Overruled. Do you remember? A. Yes; it was brought up.

Q. By Mr. Mitchell: What was said at that discussion?

Mr. Robinson: I object to the question. There has not been a proper foundation laid, time and place.

Mr. Mitchell: All right.

(Testimony of Nathaniel N. Eddy)

Q. Who was present and where was it?

A. All my investigation with the attorneys was with Mr. Wetzler.

Q. Yes. And where? A. In his office.

Q. Shortly prior to the date you gave?

A. Yes; some time prior.

Q. January and February of 1937? A. Yes.

Q. All right. Now state the conversation, please.

A. I don't recall any. He did the talking about it and I asked for proof that these were the facts. That is all I [400] can recall.

Q. Was any evidence furnished to you at that time concerning any property settlement agreement?

A. No.

Mr. Robinson: I object to the use of the word "evidence" and move to strike the answer.

The Court: Yes; sustained.

Q. By Mr. Mitchell: Any data or material or information furnished you at that time relating to the property settlement agreement? A. No.

Q. Was any data or information furnished you at that time concerning a partnership agreement? A. No.

Q. Between the spouses? A. No.

Q. Was any data or information furnished you concerning any joint bank accounts of the spouses? I will withdraw that.

Was any data or information furnished you concerning any joint tenancy real estate that went into Trust No. 6204?

The Witness: Pardon me, again, what was that?

The Court: Mr. Reporter, read it, please.

Mr. Mitchell: Read the question, please.

(Question read by the reporter.) A. No. [401]

(Testimony of Nathaniel N. Eddy)

Q. We are still referring to your 1937 investigation.

A. I understand.

Q. And what is your answer? A. No.

Q. Did you have any conversation with either Mr. James Ferry or Mrs. Catherine Ferry during this 1937 investigation? You have already testified to one with Mrs. Ferry. Did you also have one with James Ferry?

A. Yes.

Q. Can you refresh your memory as to the subject of that discussion with Mr. James Ferry?

A. I interviewed Mr. James L. Ferry at his office at the plant where decedent had this street paving equipment, and so forth, by appointment. I met him there and questioned him regarding the transfers.

Mr. Robinson: I move to strike "questioned him regarding the transfers." There has not been a proper foundation laid for conversations.

Q. By Mr. Mitchell: When and where was this conversation? You have stated where the conversation was. Approximately what time was it?

A. Some time in the a. m., as I recall it.

Q. Morning of what year or month? Was it before you—

A. And latter part—I could only say the latter part of 1936, possibly early in January, 1937. I could not fix the exact date. [402]

Q. Who all was present besides yourself and Mr. James Ferry, if anyone?

A. As I recall, we were alone.

Q. All right. State the conversation now, if you will, please.

A. I think we spent probably over an hour, maybe two hours, together going through the matters returned

(Testimony of Nathaniel N. Eddy)

in the estate, with particular reference to the properties, the real properties, and the gifts made, one gift in particular to him.

Q. What gift was that, Mr. Eddy?

A. It was a gift made to him, to James L. Ferry, on December the 8th, 1934, returned in Form 706.

Q. Were there any other gifts?

A. That gift was the business, the paving business that he turned over to him at that time, and also was discussed.

Mr. Robinson: I move to strike the entire answer as not responsive to the question asked and not responsive to a conversation, not part of a conversation, a mere conclusion of fact that there was a gift made.

The Court: Just state what James L. Ferry said to you about receiving property, and then, what form it had will be for the court to decide, Mr. Eddy. Just what he said and what you said. You were talking about business, some business, and what did he say about it?

A. He said his father gave him that stock in a bank, [403] too, some stock in a bank, the First National Bank in Glendale; and he said his father gave him that stock because, to induce him to remain in the employ of the bank, for that reason.

Q. By Mr. Mitchell: What other subjects did you discuss at that time or during those two hours?

A. I don't remember other subjects as to conversation.

(Testimony of Nathaniel N. Eddy)

Q. Did you during this investigation have any other conversation with Mr. James Ferry?

A. I don't recall that I had further conversation with him. [404]

* * * * *

A. I saw James and Peter L., Jr.

Q. By Mr. Mitchell: Peter, Jr.?

A. Yes; that is right.

Q. That was about the same time? A. Yes.

Q. Any other member of the family? A. No.

Q. During these conversations with Mrs. Ferry and James Ferry and Peter Ferry during this 1936 and '37 investigation did you receive from anyone or all of them or any of them any information or data concerning a partnership agreement between the spouses which had its inception in the time of their marriage?

Mr. Robinson: I object to the question as calling for a conversation without a foundation having been laid.

Mr. Mitchell: If the court please, there was no conversation on that subject and the Government is bringing out the fact that such a contention was not considered at any time, and all of his considerations in this case, the subject was never mentioned; and the only way I can bring it out is by asking the witness. [405]

Mr. Robinson: Object to it as incompetent, irrelevant and immaterial whether it was presented to this witness or not. It would have no bearing upon the issues in this case.

The Court: No; but the evidence here is that the matter was not discussed at all and that ends it.

Mr. Mitchell: May the witness answer?

(Testimony of Nathaniel N. Eddy)

The Court: Yes. He says it was not discussed, the partnership matter.

A. I have no report that it was discussed and I have no memory that it was.

* * * * *

The Court: What is the exhibit number, Mr. Mitchell?

Mr. Mitchell: Exhibit No. 59.

Q. By the way, you have already identified your signature on this? A. That is correct.

Q. Exhibit 59. After that exhibit was— [406]

The Court: What is the date, again, of that?

Mr. Mitchell: January 25, 1937.

Q. What do you call this? Have you any name for this particular type of letter that goes out after an investigation, Mr. Eddy?

A. Yes. That is a summary of changes made in the return, Form 706, which was filed with the Government, that the agent has recommended to the Commissioner.

Q. What is the next step in the procedure of the Bureau of Internal Revenue? Do you make a report for the Internal Revenue Agent? A. Yes.

Q. Covering your investigation? A. Yes.

Q. And what is done with that report?

A. That report is audited in the office by—

Q. What office? A. Of my office.

Q. By someone else?

A. The Internal Revenue Agent's office, by a reviewer who goes over all the reports; and if he agrees with the report, he certifies to that; and, of course, all the mathematics are comptometered, corrected, a schedule made up; and the procedure is that if, after this memo—

(Testimony of Nathaniel N. Eddy)

it is really a memorandum of changes made by the agent—is not agreed to by the executor and a waiver is not secured, then the agent's [407] office sends out what we call a 30-day letter to the executor, stating that the report is sustained as submitted by the agent in the field.

Q. Just a moment. You say, "if it is not agreed to." There is nothing mentioned in this Exhibit 59 which was mailed by the Internal Revenue Agent's office to Freston & Files, attorneys of the executrix, as far as—oh, it does mention a waiver. I am sorry. "A waiver form." Was a waiver form enclosed with this letter?

A. It was.

Mr. Mitchell: May we have the waiver form, Mr. Robinson, that accompanied the letter?

Mr. Robinson: I do not have it in my possession. I assume it was the usual form of waiver.

Mr. Mitchell: Will you stipulate that it was or was not signed?

Mr. Robinson: I do not have the information within my knowledge, so I don't see how I could.

Mr. Mitchell: Does the attorney know, Mr. Wetzler, who handled it?

Mr. Wetzler: I don't think one was signed, Mr. Mitchell.

Q. By Mr. Mitchell: Then, if it is not agreed to and waiver signed, what is done?

A. This 30-day notice is sent out from the agent's office, my office, and that sets forth the Bureau's findings and the— [408]

Q. A letter is sent out to whom?

A. To the executrix or executors.

(Testimony of Nathaniel N. Eddy)

Q. That is after this letter?

A. Yes. And we have nothing further to do with the case. It is out of our hands in the field.

Q. About how long would you wait before sending out that letter? What is that letter called? Is that called "a 30-day letter"?

A. That is called "a 30-day letter;" that is correct.

Mr. Mitchell: We will now demand the production of the 30-day letter that was received by the executrix.

Mr. Robinson: Have you made a demand therefor prior to this?

Mr. Mitchell: I am now making a demand.

Mr. Robinson: That is not attached to the stipulation of facts in this matter now, is it, Mr. Mitchell?

Mr. Mitchell: Maybe it is. I hope it is. [409]

* * * * *

Mr. Robinson: May I call your attention, Mr. Mitchell, to page 29 of the stipulation of facts, line 23?

Mr. Mitchell: All right. We will call the witness' attention to it.

Q. What is "Form 890," Mr. Eddy?

A. It is a waiver.

Q. I hand you Exhibit A attached to the stipulation of facts, a letter addressed to the "Estate of Peter Ferry—Catherine B. Ferry, Executrix," dated August 4, 1937, and signed "D. S. Bliss, Deputy Commissioner." That is not the letter to which you refer, is it—or is it? This was in 1937, Mr. Eddy. It may be you are thinking about the present practice—I don't know—rather than the practice in 1937.

(Testimony of Nathaniel N. Eddy)

A. I would say, although I am not familiar with the exact wording of these 30-day letters, but from the text below here, at the bottom of page 29, the Commissioner writes:

"However, a protest against the proposed deficiency may be filed within 30 days from the date of this letter" and that they have a hearing in this office.

Q. That is what office?

A. In our office. However, it may be that this was taken direct to Washington. I don't know that.

Q. You don't remember? [410]

A. No; I don't remember and I would have no record of that.

Q. Do you recall whether you handled the protest, if any was filed?

A. The protest was submitted to me through the regular channels of my office to comment upon and furnish any additional data; in other words, to answer that first protest and—

Q. Do you recall about what time that was assigned to you?

A. I would like to refresh my memory from the record.

Q. All right.

A. This all happened about six years ago and I can't remember it all. I gave an answer to my office on a claim for a refund. [411]

* * * * *

The Witness: Yes. Under date of February the 5th, 1940, a claim for refund was referred to me to answer and obtain any further data that I could from—pardon me.

(Testimony of Nathaniel N. Eddy)

Q. All right. What was that date?

A. I made the report on February the 5th, 1940.

Q. Yes. I call your attention to Exhibit E attached to the stipulation of facts and ask you whether that refreshes your memory as to the matters you considered at that time. I call your particular attention to page 43 of the stipulation of facts, portion of the Exhibit E, page 43, line 23.

A. Beginning "That in each and every"?

Q. Yes. Just read it to yourself from there on just to refresh your memory as to what matters were considered pursuant to the refund claim.

A. This particular refund claim could not have been submitted to me to verify, because it is dated February the 10th, assigned by the executive February the 10th, 1939—wait a minute. Pardon me. I would like to withdraw that. [412] I can't say that that is the exact claim that came before me because of the dates. This claim for a refund is dated February the 10th, 1939, and my report, February the 5th, 1940. This must refer to some other.

* * * * *

Mr. Mitchell: No. I am asking you to refresh your memory as to the matters which you considered, by looking at the claim, if you can.

A. This claim sets forth a statement which I read, and I asked the attorneys—

Q. Now, who were the attorneys then?

A. Claude I. Parker and Ralph W. Smith. [413]

* * * * *

(Testimony of Nathaniel N. Eddy)

Q. By Mr. Mitchell: I will ask you was Mr. J. Everett Blum one of the attorneys in Mr. Smith's office?

A. Yes. I was referred to Mr. Blum in that office to take up the matter.

Q. Just a minute. What matters did you want to take up?

A. All the matters of this claim for refund.

Q. I see.

A. Particularly as to the trust agreements.

Q. Did you have any conferences with Mr. Blum at any time concerning the subject matter of this claim for refund?

A. Yes; many times.

Q. Where was the first conference?

By the way, did you interview anyone other than Mr. Blum pursuant to your consideration of this refund claim?

A. Yes. I talked to Mr. Ralph W. Smith, and that is all I recall in this case; and I was referred to Mr. Blum as handling it personally, so I contacted him on November 23, 1939—or, October the 23rd, 1939, and requested him to—

Q. Wait a minute. Where, where did you contact him?

A. At his office.

Q. At his office? A. Yes.

Q. And who else was present, if anyone?

A. No one that I recall. [414]

Q. All right.

Mr. Robinson: Are you going to ask what the conversation was? Ask it and I will object.

Mr. Mitchell: Yes.

Q. What was the conversation?

Mr. Robinson: I object to the conversation on the ground there has not been a proper foundation laid. I am somewhat quite surprised. Mr. Blum is an officer

(Testimony of Nathaniel N. Eddy)

in the United States Navy, and I must ask with particularity that the agency, if any, of Mr. Blum be established.

Mr. Mitchell: Will you withdraw from the stand, Mr. Eddy, just a moment? And will you take the stand, please Mr. Robinson? (Witness temporarily excused.)

JOHN MOORE ROBINSON,

called as a witness on behalf of the defendant, being first duly sworn, was examined and testified as follows:

The Clerk: Your full name?

The Witness: John Moore Robinson.

Mr. Mitchell: Before asking you questions as a witness, Mr. Robinson, I will ask whether you will stipulate that Mr. Blum was associated with Mr. Ralph E. Smith during the time that the refund claim was pending in the Bureau.

Mr. Robinson: You mean Mr. Ralph W. Smith?

Mr. Mitchell: Was associated with Mr. Ralph W. Smith?

Mr. Robinson: And you mean Mr. J. Everett Blum?

Mr. Mitchell: J. Everett Blum, of course. I ask you [415] whether—

Mr. Robinson: He was an employee of the firm of Claude I. Parker and Ralph W. Smith.

Direct Examination

By Mr. Robinson:

Q. During this particular period? A. Yes.

Q. How long was he employed?

A. I believe his employment started about the year 1931.

(Testimony of John Moore Robinson)

Q. And the office of Claude I. Parker and Ralph E. Smith was attorneys for this estate?

A. Ralph W. Smith.

Q. Ralph W. Smith was attorney for this estate at that time? A. I do not know that to be a fact.

Q. Very well. I will call your attention to the refund claim, a copy of which is attached to the stipulation of facts.

The Witness: I might be able to clear the matter up.

Q. Bearing a certificate signed "J. Everett Blum with Claude I. Parker and Ralph W. Smith."

A. Mr. Wetzler is here in the court room and he is familiar with the matter as to what our office was employed for. I do not know, other than for the purpose of handling a particular tax matter. I do not know what the scope of the [416] agency was. I am sure there won't be any question on it. Mr. Wetzler will be only too glad to furnish it.

Q. Then, you question the authority of Claude I. Parker and Ralph W. Smith through J. Everett Blum whose signature is attached to the exhibit already in evidence and filed by you? You question their authority to act for the estate in this matter?

A. I do not know to what extent they can bind an executrix by conversations.

Q. You question their authority to act for the executrix?

A. On certain matters, but not on all matters.

Q. On matters in connection with the refund claim?

A. I do not know what the authority was in connection with that refund claim.

(Testimony of John Moore Robinson)

Mr. Mitchell: I think I won't ask any more questions, your Honor. Counsel has testified that—

That is all; you can withdraw.

(Witness excused.)

Mr. Robinson: I can have Mr. Smith come up, who knows the facts, or Mr. Wetzler. I will produce them if you wish it.

Mr. Mitchell: I think it self-evident that with respect to the claim he represented the estate. His name is signed above— [417]

* * * * *

Mr. Mitchell: Please resume the stand, Mr. Eddy.

Mr. Robinson: At the close of the last session a discussion was taking place as to the authority of Mr. Blum, and I assumed Mr. Blum's authority was, perhaps, limited to a certain extent, as was my authority. To clear up the question I brought Mr. Ralph Smith, head of the office here, and he would like to make a statement to the court

The Court: Proceed, Mr. Smith.

Mr. Ralph W. Smith: If the court please, the manner of handling matters of this type in our office, if I am too busy to take them myself, I put them over on one of our assistants, and this matter was turned over to the desk of Mr. J. Everett Blum. I told him that, as he always understood, if there were matters of decision to make, he was to discuss those particular matters with me; and in a case of this kind, where it came in through other counsel—this matter was brought to our office by Mr. Collins and Mr. Wetzler, other attorneys—we should also discuss the matters of theories and procedure and our contemplated steps of protest or assignments of error with them. [419]

* * * * *

The Court: Yes. You have Mr. J. Everett Blum's certificate attached to the protest.

Mr. Smith: Yes. [422]

* * * * *

Mr. Smith: We are not repudiating that in any way he had absolute authority, and I just say the policy of the office, he should have discussed it and I presume he did discuss everything.

The Court: Yes. He had authority, then, to follow that up with discussions with whatever revenue agent called upon him?

Mr. Smith: There is no doubt about that, your Honor. [423]

* * * * *

NATHANIEL N. EDDY,

recalled as a witness on behalf of defendant, having been previously duly sworn, was examined and testified further as follows:

Direct Examination

(resumed.)

By Mr. Mitchell:

Mr. Mitchell: Now, Mr. Reporter, will you please read the last question?

Q. I think you were testifying, or had been asked the time of a conference you had with Mr. Blum in Mr. Smith's office following the assignment of the refund claim to you in October, 1939, I believe you testified. Do you recall—I think you have stated the approximate time and place in Mr. Smith's office in Los Angeles. Will you

(Testimony of Nathaniel N. Eddy)

state the conversation now that took place in Mr. Blum's office at that time?

A. Well, that was on repeated dates, oh, covering many weeks in which I would ask for—

Mr. Robinson: Just a minute. I move to strike the answer as not responsive to the question asked.

Mr. Mitchell: I am speaking now only of a conference in [424] the office of Mr. Blum, with you present and Mr. Blum present. Was anyone else present at this conference? A. No; I think not.

Q. All right. Will you proceed with the conversation?

The Court: The approximate date of that, Mr. Mitchell?

Q. By Mr. Mitchell: What was the approximate date? A. Well, which one?

Q. How many times were you in Mr. Blum's office, Mr. Eddy?

A. November the 2nd, November the 27th, December the 4th, December the 20th, 1939; and on January the 3rd, January the 12th, February the 5th, 1940.

Q. Are you sure that you were in his office, personally in his office on all of those occasions?

A. I would say that I was not personally in his office on all of those occasions.

Q. All right. Then, let us take up the one—you do not have to give me the exact date, but the approximate date—in which you personally were in his office.

A. I couldn't say by taking a date.

Q. The approximate date. Can you give us what month? A. I would say November.

Q. 1939? A. Yes.

(Testimony of Nathaniel N. Eddy)

Q. All right. Now state the conversation, please.

Mr. Robinson: What date, November the what?
[425]

Mr. Mitchell: The month of November.

A. At that time I asked him for data, proof as to the contentions claimed in the refund.

Q. What contentions were those? Did you go over the contentions or did you just refer to the refund claim?

A. Just referring to the refund claim.

Q. Which you had before you at the time?

A. Yes.

Q. All right.

A. Well, I may not have had it with me, but he knew about it.

Q. You had it at the office, your office, I presume?

A. Yes.

Q. All right.

A. With reference to the contribution of the community funds used in the purchase of life insurance policies and other points. There was the claims contained in the matter of the six trusts and as to the extent of one-half being claimed as the community property of the wife; and those were the only two issues, I believe, the trusts and the life insurance, at that time.

Q. All right.

A. And I asked for this data so that I could make some investigation to prove whether it was correct, in conformity with our method of procedure; and he said he would get it and he had it but had not gotten it all written up, he hadn't [426] it all written up. And he said that the data, he had the data ready, and he said he had been unable to get it out and did not know when he could. That was the last conversation.

(Testimony of Nathaniel N. Eddy)

Q. That was which conversation, the first?

A. No; that was the last one. That was the last of all the *conversation*.

Q. All right. Now just state the conversations you had with him, whether in his office, and state where the other conversations were and give the dates.

A. If I had them, other conversations were on the telephone.

Q. Did you only have one conversation in his office?

A. There may have been two. I can't recollect that.

Q. All right. What was the subject matter of those telephone conversations?

A. The same; no different.

Mr. Robinson: I move to strike the answer, there not having been a proper foundation laid.

The Court: It may go out.

Q. By Mr. Mitchell: Do you know Mr. Blum's voice on the telephone? A. Surely.

Q. How many years have you been talking to him on the telephone?

Mr. Robinson: Mr. Mitchell, I want it just tied down to a date so we can be able to rebut it. [427]

The Court: The approximate date. Whenever you give us a conversation, Mr. Eddy, give us as near as you can, the date when you discussed that particular transaction with Mr. Blum, and counsel will have some chance to cross examine.

Q. By Mr. Mitchell: Let us take them one at a time, Mr. Eddy. You have testified to the first one in November, a conversation in his office. When was the next

(Testimony of Nathaniel N. Eddy)

time you talked to Mr. Blum anywhere or over the telephone?

A. The first conversation could have been on November the 2nd or on November the 27th.

Q. Do you know Mr. Blum's voice over the telephone?

Mr. Robinson: I will stipulate that he does.

A. Oh, yes; no question of that.

Mr. Mitchell: I thought that was your objection.

Mr. Robinson: No. I simply want to tie it down to find out when they were discussing it.

Mr. Mitchell: All right.

A. It is quite possible I saw him or talked to him in the office on December the 4th, but I can't remember that. But on December the 20th and January the 3rd and January the 12th—

Q. 1940?

A. 1940, and again on February 5th, I am inclined to believe those were telephone calls, because I had been down so much and I could get it over the phone just as well.

Q. All right. State the substance of those various [428] calls, if they were all the same. Just state the substance; what did you say and what did he say?

A. I said that we were anxious to close the case and there had been no—he had not furnished the data; that he had promised it and we would have to close it on the information we had in mind because there was no information given me which I could investigate. So I was—

Q. The information you had in mind?

A. I said there was no information given me which I could investigate, therefore, because of the general rules and procedure of the office, I told him, I would have to close the case.

(Testimony of Nathaniel N. Eddy)

Q. On what information?

A. Without any information further on those subjects because it had not—

Q. Further than what?

A. Further than what was stated in the agreements themselves, in the trusts and the statements he had made in the refund.

Q. The claim for refund do you mean?

A. That is right.

Q. Did you have any discussions of the matter with Mr. Smith?

A. I might have talked to Mr. Smith. I don't recall definitely. I always do see him when I go down there, and I must have said something to him about the case and my [429] impression is that he referred me directly to Mr. Blum as handling it personally.

Q. In these conversations with Mr. Blum did he ever furnish you any information concerning some joint tenancy property owned by Mr. and Mrs. Ferry that went into Trust 6204? A. No. [430]

* * * * * * * * *

Q. Did Mr. Smith ever give you any information in that regard? A. No.

Q. And did any of the Ferrys give you any information in that regard during your two investigations?

A. No.

Q. I will ask you whether Mr. Smith ever furnished you or suggested to you that some separate funds of Mrs. Ferry were used to pay insurance premiums?

A. No.

Q. Separate funds, not new type community?

A. No.

(Testimony of Nathaniel N. Eddy)

Q. Did Mr. Blum or Mr. Smith ever suggest that to you? A. No. [431]

Q. Did anyone ever suggest it to you during your two investigations? A. No.

Q. I ask you whether on January 12, 1940, you talked to Mr. Blum on the phone the last time regarding the data?

A. I am quite sure that that was over the telephone.

Q. What did Mr. Blum say?

A. He always repeated the story that he would get it out as soon as he could; that he did not have it ready and would furnish the data as soon as he could.

Q. Is that what he said on January the 12th?

A. On all occasions that was the general conversation, maybe not his exact words, but that was the result.

The Court: You do not mean "result"; you mean substance, don't you? A. Yes. Pardon me.

Q. By Mr. Mitchell: What did you do then, Mr. Eddy? [432]

* * * * *

Q. By Mr. Mitchell: I am not asking you what Mr. Blum did now, Mr. Eddy. I am asking you what you did.

A. I reported the progress on the case to my chief assistant tax officer.

Q. As of what date? A. On about the—

Q. Haven't you got the exact date there before you?

A. Well, I wrote my report on the 25th day of January. It was probably that date, January 12th, around there, that I took up the matter with him. As soon as I could see him I told him that the data was not forthcoming and what should I do. Should I wait further and get this data or close the case. He says, "We can't wait any longer because it has been such a long time in

(Testimony of Nathaniel N. Eddy)

the files. Report the facts as you [433] have before you and close the case in the field." That is what I did.

The Court: The conversation may go out with the superior as hearsay. Proceed.

Mr. Mitchell: If the court please, counsel did not object to that testimony, I think, because—

Mr. Robinson: I move to strike the conversation. [434]

* * * * *

Q. By Mr. Mitchell: Then, what did you do, Mr. Eddy, in this connection, or were your duties finished after you made this report to your superior?

A. My duties were complete then.

Q. You did not make a report?

A. Oh, I wrote the report. Here it is.

Q. That was after your conversation with your superior, wasn't it? A. Yes, sir.

Q. To whom does that report go? To whom is it addressed in the ordinary course?

A. Well, to the Internal Revenue agent in charge.

Q. That is in this case Mr. —?

A. George Martin. [436]

Q. George Martin? A. Yes.

Q. And in the ordinary course what happens to it after you deliver it to the revenue agent in charge?

A. Well, it is transmitted to the Commissioner of Internal Revenue in Washington, D. C.

Q. And then, what does the Commissioner do with it, if you know, in the ordinary course?

A. The case is reviewed there and reported back to the agent in charge, his conclusions and findings.

Q. By the Commissioner?

A. By the Commissioner, on the basis of my report.

(Testimony of Nathaniel N. Eddy)

Q. And the basis of any report based on the review?

A. That is right.

Q. In Washington?

A. That is right.

Q. I hand you Plaintiff's Exhibit 2, Mr. Eddy, and call your attention to page A-3, Schedule A, entitled "Real Estate", Item 1 under Schedule A, valued at \$200 in the return. Was any claim ever made to you or anyone else, or did you ever learn in the files of the case during your investigations that Mrs. Ferry claimed a one-half interest in that particular parcel of real estate? [437]

* * * * *

A. No.

Q. By Mr. Mitchell: Not by the attorneys or by the members of the family or anyone else? A. No one.

Q. Now I call your attention to Schedule B, securities—"Stocks and Bonds," Items 1 through 35. Do you recall in whose names those bonds stood, or have you any information from which you can refresh your memory?

Will counsel stipulate that they stood in the name of decedent, alone?

Mr. Robinson: Counsel, I believe they are bearer bonds.

Mr. Mitchell: You will not stipulate that those stood in the name of decedent, then?

Mr. Robinson: No. [438]

* * * * *

Q. Do you recall—did you find it, Mr. Eddy?—to whom those bonds were payable or whether they were bearer bonds?

A. I never saw the bonds. They were returned as his sole property, is all I can say, both by the probate and—

(Testimony of Nathaniel N. Eddy)

Q. That appears by the return. I ask you now whether or not you ever heard a claim made by counsel for the estate or by any member of the surviving Ferry family or by any member of your office to the effect that Mrs. Ferry owned an undivided one-half interest in those bonds.

Mr. Robinson: I object to the question on the ground it is outside the issues in this case and therefore incompetent, irrelevant and immaterial.

The Court: Overruled. Exception allowed plaintiff.

A. No.

Q. By Mr. Mitchell: And that refers to all 29 bond items contained in Schedule B? A. Yes.

Q. The 29 items. Now I call your attention to certificates of stock, still under Schedule B, on page A-8 of Exhibit 2. The items are numbered 30 through 35, the [439] first, block of Associated General Contractors Purchasing Corporation stock; Southern California Edison, No. 31; California Edison stock, No. 32, 7 per cent preferred, Series A; 33, stock of Mission Playhouse Corporation; 34, capital stock of Columbus Building Club of Glendale; and 35, stock of the First National Bank at Glendale. Do you know in whose name that stock stood, of your own knowledge?

A. Only from the probate records, that they stood in his name.

Q. Did any attorney for the estate at any time during your investigations or any member of the Ferry family ever claim to you, or anyone ever suggest to you that Mrs. Ferry had an undivided one-half interest in those shares of stock? A. No.

Mr. Robinson: The same objection.

A. No.

(Testimony of Nathaniel N. Eddy)

The Court: Let the record show the same ruling.

Q. By Mr. Mitchell: I now call your attention to Schedule C-1, containing mortgages, notes, and cash. The first item is commercial account, on page A-9 of Exhibit 2, Schedule C-1. The first item is commercial account with the Citizens National Trust and Savings Bank of Los Angeles \$127.36, Peter L. Ferry. I will ask you whether any of the attorneys or members of the Ferry family ever claimed that Mrs. Ferry had an undivided half interest in that bank account.

A. No. [440]

Q. I now call your attention to Schedule D-1, entitled "Jointly owned property", the first item, commercial account in the First National Bank of Glendale, in the name of Peter L. Ferry & Son. That is a joint tenancy, jointly owned property. Was any claim ever made to you by any of the attorneys for Mrs. Ferry or by Mrs. Ferry or any members of her family during your investigations that Mrs. Ferry was the owner of an undivided one-half of \$3,140.70 in that account?

A. Is that Item 2 of—

Q. Item 1. A. Item of C-2?

Q. Schedule D-1.

A. Oh, D-1. I have it. No.

Q. No such claim was ever made to you?

A. No such claim.

Q. Now calling your attention to the next item, Item 2 of Schedule D-1, an account in the First National Bank of Glendale, savings account, in the name of Peter L. Ferry Ranch, \$1,500, did anyone ever make a claim that Mrs. Ferry was the undivided owner of any portion of

(Testimony of Nathaniel N. Eddy)

that account? I refer to any of the attorneys for the estate or any of the members of the Ferry family.

A. No.

Q. I now call your attention to Item 3, an account with the First National Bank of Glendale, returned—by the [441] way, commercial account standing in the name of Mr. and Mrs. P. L. Ferry, the amount on hand at the time of death \$28.59 and returned in the estate tax return at \$14.29. What, if anything, did you recommend in connection with that and why did you make the recommendation?

A. That was returned as one-half vested in the wife, apparently, \$14.29. However, there was no evidence to show that she had contributed anything to the joint account and therefore I recommended the total amount as belonging to the decedent of \$28.59.

Q. Now the next item, California Bank, commercial account, in the name of Peter L. Ferry, returned—

Mr. Robinson: I will stipulate, Mr. Mitchell—let's see—on No. 4, No. 5, No. 6, that his answer will be the same as it was on Nos. 1 and 2.

Mr. Mitchell: Very well. I will accept that stipulation.

The Court: Items 4 and—what is that?

Mr. Mitchell: Items 4, 5 and 6.

Mr. Robinson: 4 is the California Bank, commercial account, \$235.68; 5 is First National Bank of Lemoore, \$651.86; 6 is Security-First National Bank, Hanford Branch, \$154.17.

The Court: All right.

Mr. Mitchell: For your Honor's information, 4 stood in the name of Peter L. Ferry; 5 stood in the name of

(Testimony of Nathaniel N. Eddy)

Peter L. Ferry Ranch; and 6 stood in the name of Peter L. Ferry Ranch. [442]

Q. I ask you in respect of the two Peter L. Ferry Ranch accounts did you investigate to see whether anyone else could draw on that account—those two accounts besides Mr. Ferry? A. Yes.

Q. What was your recommendation in that regard and why?

A. That F. C. Diener, a son-in-law, could draw on that account. He was a joint tenant with the decedent in that account.

* * * * * * * *

Q. Did you have a conversation with someone about the ownership of those funds? A. Yes.

Q. With whom? A. Mr. James Ferry.

Q. When and where was that conversation? Is that the one you testified to this morning? [443]

A. Yes; that is right.

The Court: Any admissions he would make would not be binding on someone else. In other words I can say that this money here belongs to Smith.

Mr. Mitchell: Your Honor is probably right in that respect. I will merely ask the witness why he recommended the inclusion.

A. Admitted by the executrix because returned for the full amount.

Q. I see. And No. 7, did you investigate to see in whose name that account, Peter L. Ferry Ranch—Anyone else have a right to draw on that account, do you know, or did you investigate that?

A. Well, let's see. I have combined 5 and 6. Yes; they were both subject to withdrawal by the same party,

(Testimony of Nathaniel N. Eddy)

F. C. Diener, and the same information applies, that it was the sworn statement of the executrix and was returned as decedent's cash.

Q. Item 7, an account does not appear—yes. An account returned as Item 7 as a joint tenancy account in the Pacific States Savings Bank, in the name of P. L. Ferry and Catherine B. Ferry as joint tenants, as appears in Exhibit 2, Schedule D-1, Item 7, \$173.27 balance in the account at the time of death, and returned in the return at \$86.63, which is one-half. What, if any, recommendation did you make concerning that, or investigation? [444]

A. That was found to be joint with Catherine B. Ferry and one-half was recommended only as taxable.

Q. Why did you make that recommendation? You say you recommended that only half be taxable?

A. No. I recommended that all of it—no, no; only one-half taxable.

Q. One-half was reported.

A. That is right. Oh, pardon me. I withdraw that. I recommend all taxable as his separate property.

The Court: What item was that?

A. Both 7 and 8. You are talking about 7?

Mr. Mitchell: I am speaking now of 7.

A. Yes.

Q. Why did you recommend it all taxable?

A. There was no proof of contributions by the surviving joint tenant; that she ever contributed anything to the account.

The Court: Was that a bank account, Mr. Mitchell?

Mr. Mitchell: Yes, your Honor.

The Court: In what bank?

(Testimony of Nathaniel N. Eddy)

Mr. Mitchell: A joint tenancy bank account in the Pacific States Savings. I guess that is a building and loan association.

The Court: What was the amount?

Mr. Mitchell: In the amount of \$173.27.

The Court: What was the amount in 8? [445]

Mr. Mitchell: The amount in what?

The Court: No. 8?

Mr. Mitchell: No. 8 is 700 shares of the capital stock of the State Guaranty Auxiliary Corporation, endorsed by Peter L. Ferry, valued by the executrix at \$175 and reported as taxable in Exhibit 2, the estate tax return, at \$87.50.

Q. Did you do the same in respect of that item, Mr. Eddy?

A. Yes. Yes; reported all as the decedent's property.

Q. Is that also true of Item 11, 35 shares of Glendale Research Hospital?

A. Yes; except as to the value returned and the value recommended.

Q. You have changed the value?

A. Yes. On the basis of sales I changed the value from \$50 to \$1,225.

Q. And you recommended that all of it be included?

A. That is right.

Q. And why did you recommend that all of it be included?

A. On the same grounds as the other—no contribution claimed—claimed or proven to be given by the surviving joint tenant.

Q. Then, Item 14, of 420 shares of State Guaranty Corporation, the value in the estate tax return fixed at \$525, and the amount reported as includable in the gross

(Testimony of Nathaniel N. Eddy)

[446] estate, \$262.50. What, if anything, did you recommend in respect of that item and why?

A. The value was changed to include the whole property, the whole value of the property on the different valuation only, total of \$945, which was the total value of the whole property on the same grounds as the others.

Q. Is your answer exactly the same in respect of Item 16, 4 shares Crescenta Mutual Water Company?

A. That particular item was returned at \$50 and recommended of no value. After an investigation it had no value.

Q. I see. It was reduced to that extent?

A. That is right.

Q. I now call your attention to Schedule D-2, "Other Miscellaneous Property" contained in Exhibit 2.

Item 1 is "One Ford Deluxe Sedan, 1932 model, fair market value \$200" as returned by the executrix. Did counsel for the plaintiff or did any members of plaintiff's family ever claim that Mrs. Ferry had any undivided interest in that automobile? A. No.

Mr. Robinson: I will stipulate as to the remaining items that his testimony would be the same, on that Schedule D-2, to speed it up.

Mr. Mitchell: The stipulation is accepted and refers to Items 1, 2, 3, 4, and 5 on page A-19 of Plaintiff's Exhibit [447] 2.

Q. Now I call your attention to tax deductions at the bottom of page A-28, and I will ask you what those tax deductions are reported, if you investigated it and ascertained, recited here in the return, at 100 per cent or only 50 per cent?

A. 50 per cent. Let's see. Wait a minute.

(Testimony of Nathaniel N. Eddy)

Q. Now let us take the tax item 1, Ed Hopkins, Assessor, personal property, \$65.96.

Mr. Robinson: What was that, counsel?

Mr. Mitchell: Page A-28.

Mr. Robinson: Oh, I see; all right.

A. In A-28?

Mr. Mitchell: A-28.

A. That is Schedule H.

Q. Schedule H is right, of Exhibit 2.

A. And you refer to what item?

Q. Below the middle of the page, Item 1, under "Taxes—See sheet attached." The amount is \$45.81.

A. That is right.

Q. And the "sheet attached" refers to personal property taxes for 1935. A. \$65.96.

Q. \$39.96 at the top of page A-29, but a total of \$45.81. Then those items on page A-29— [448]

* * * * *

Mr. Mitchell: Will counsel stipulate that these personal property and real estate taxes were reported at 100 per cent rather than—

Mr. Robinson: I think they were 50 per cent, counsel.

The Court: What is your recollection, Mr. Eddy?

A. I think they were 100 per cent.

Mr. Robinson: On Trust 6204 do you think it was 100 per cent?

A. I think so, because I made no record here of splitting them, because I returned them—I mean I recommended the inclusion of all the properties and excluded any interest in the community, therefore, I would recommend the total amount of deductions.

(Testimony of Nathaniel N. Eddy)

Q. By Mr. Mitchell: Did you change them as returned by the plaintiff, Mrs. Ferry?

A. Pardon me, that question?

Q. Did you make any change in the amounts returned by Mrs. Ferry?

A. Not on the specific items you have mentioned.

Q. Let us take the top of the page A-29, "Personal property tax, 1935 \$39.96."

Mr. Robinson: I will stipulate Mr. Eddy's recollection [449] is they were included 100 per cent.

A. The first item, if you please, is \$45.81.

Mr. Mitchell: At the top of page A-29?

A. Yes.

Mr. Mitchell: No; it isn't. It is \$39.96. Look at the return. I am talking about the return. Here is the return.

A. Oh, I see.

Q. Page A-29, top of the page, Schedule H.

Mr. Robinson: Off the record, Mr. Mitchell:—

The Witness: Oh, I know what the trouble is. I have added two items together. I should explain that the taxes are \$45.81, is correct, and it includes the \$39.96 and \$5.85.

(Counsel conferring privately.)

The Witness: Doesn't that make it?

Mr. Mitchell: That is a total of \$45 something.

A. That is right.

Q. Did you check those bills to see that they were correct? A. Yes.

Q. Were they 100 per cent or 50 per cent?

A. There, that is my report. (Exhibiting to counsel.)

Q. Did attorneys for the taxpayer or did any members of her family claim that only 50 per cent should be de-

(Testimony of Nathaniel N. Eddy)

ducted because half of the obligation was the obligation of Mrs. [450] Ferry? A. No.

The Court: The report was 100 per cent, was it?

A. Yes, sir.

The Court: All right.

Q. By Mr. Mitchell: I now call your attention to the "Debts of decedent," on page A-30 of the tax return.

Mr. Robinson: What page was that, counsel?

Mr. Mitchell: Page A-30 of the tax return, Schedule I, "Debts of decedent."

Q. Item 9, "Nagel's Market \$18.88," did you investigate whether that was the full amount of the bill or only 50 per cent?

A. That is the full amount of the bill. I have that marked, but that item is included.

Q. Do you say the same in respect of Item 10, "Webb Dept. Store" and Item 11, "Bullock's", and 12, "Rachel Bakery", and 13, "Hilbert Produce", 14, "Frank Dener, Claim", and 15, "Promissory note payable to James L. Ferry"?

A. That is right; the full amount is included.

Q. The full amount is included. And in respect of all those did counsel for the taxpayer or did any members of her family claim that only half, only the husband's half of that obligation should be included? A. No.

The Court: Isn't the husband charged with support, Mr. [451] Mitchell?

Mr. Mitchell: Absolutely, your Honor, and the funds were—well, I might be accused of testifying if I spoke my thoughts about that. I think that is all.

The Court: Before we get away from those accounts, Mr. Mitchell, the bank accounts, clear up one or two points.

(Testimony of Nathaniel N. Eddy)

I believe you testified you made an investigation of those various trusts under which these various properties had been transferred into. Where did you make that examination, in the Trust Company's office?

A. I have copies. Yes; I received copies. They were attached to the Government's Form 706 return, which is certified or sworn to by the executrix. That is where I got that.

The Court: And also, the money that was paid out of those trusts during that period?

A. Moneys paid out of the trusts for what period?

The Court: Let us take the period that the trusts were in existence.

A. We only take the corpus as at the date of death and any capital on hand. We don't go into what is taken out or paid in.

The Court: So you never investigated—for instance. I have before me here the exhibit No. 44, which shows that there was paid from 1926 to 1935, May 29th, the sum of \$46,327.43, half of which was paid to Mr. Ferry and half was [452] paid to his wife. You never took any account of that?

A. I never have heard of this, that is, I mean I have never seen this or never have known about it at any time.

The Court: Never investigated that? A. No.

The Court: To see where that money went or into what funds or what bank account?

A. Never. It never came to my attention.

The Court: That is all.

Mr. Mitchell: Your Honor prompts another question by the defendant.

Q. Mr. Eddy, had the refund claim or the Form 706 or estate tax return asserted that any of the premiums

(Testimony of Nathaniel N. Eddy)

for life insurance were paid with the wife's separate funds would you have investigated that?

Mr. Robinson: Object to the question as incompetent.

The Court: Sustained as to what he would have done. No; I can't permit that, Mr. Mitchell, what he would have done under some other circumstances.

Q. By Mr. Mitchell: I will ask you what your practice is, then, when an estate tax is returned or is filed, reporting proceeds of life insurance, and it is stated in the estate tax return that some of the proceeds belong to someone other than the decedent, on the ground that it was paid with new type community funds. What is your practice in deter- [453] mining whether the claim should be supported by you and approved by you?

Mr. Robinson: Object to the question as not a proper hypothetical question and does not assume all the facts.

Mr. Mitchell: In this case?

Mr. Robinson: The facts in this case. You have not shown the date, Mr. Mitchell, at which this happened, because there has been a change in policy since the time of this investigation.

Mr. Mitchell: All right.

Q. During the period in which you were making your investigation in this case, to which you have testified—and I will limit it to that time—and under those conditions, the ones that were before you, what is your customary practice?

A. We demand from the executrix or representatives proof of that statement and then—

Q. Of what statement do you refer to, so we will be sure?

A. The statement they make.

(Testimony of Nathaniel N. Eddy)

Q. What statement do you mean now?

A. That someone else contributed to payments on those premiums. That was your question.

Q. No; it was not my question.

A. I beg your pardon.

Q. My question was: Where the taxpayer contends in the [454] estate tax return and in the claim for refund that the premiums were paid with new type California community funds, with new type California community funds, what is your practice?

Mr. Robinson: I am going to object to the question on the ground it calls for an opinion of an expert upon a legal matter, new type community funds, and without qualifying the man as an expert.

Mr. Mitchell: I think the witness has been handling these matters for so long, your Honor, that he knows what new type community funds are.

The Court: I will ask a question.

Do you ever have a claim made that certain moneys were paid out of new type community funds in any return, using those words "new type community funds"?

A. Plenty of them.

Q. Plenty of them? A. Many of them.

Q. Many of them?

A. I do 90 cases a year, about, and probably I would say fully 25 per cent.

Q. And they use those words; they don't use "community funds since 1927"?

A. No; I wouldn't say that.

Q. That is what I want to get at.

A. They don't use the words "new community." [455]

Q. No. That is what I want to get it. I never heard of it until this case, but I have heard of it referred

(Testimony of Nathaniel N. Eddy)

to as "since July 29, 1927." That is where they cut off, isn't it? A. That is right; that is right.

Q. That is what I want to get clear because I have never heard of it before this case.

A. No. They claim it was made by community funds.

Q. And then the date is fixed?

A. That is right, your Honor.

Q. By Mr. Mitchell: In order to clarify the question, whenever I have referred to "new type community" I referred to community acquired by earnings after July 29, 1927. A. I understand that perfectly.

Mr. Mitchell: May the witness answer, your Honor?

The Court: Yes. The thing I wanted to clear up, Mr. Mitchell, was that I had never heard of that term "new type community funds" in all the cases I have had; but I have had frequent references to "community property acquired since July 29, 1927," and that new expression, I wanted to know if this witness had ever had a claim made using those words.

Mr. Mitchell: Yes. It is just a short expression and it is quicker to say than "community acquired after July 29, 1927."

The Court: Go ahead, Mr. Mitchell. [456]

A. No.

Mr. Mitchell: Read the question, please, Mr. Reporter.

(Question read by the reporter, as amended by the use of the words "community acquired by earnings after July 29, 1927.")

Q. By Mr. Mitchell: (Continuing) In respect of such a claim?

A. We investigate the matter fully and demand proof of such payments and try to analyze them, if they were such funds paid and when and the purpose.

(Testimony of Nathaniel N. Eddy)

Q. Was any such evidence offered? A. No.

Mr. Robinson: Just a minute, please.

Q. By Mr. Mitchell: In this case?

A. No.

Q. To prove that?

The Court: "Evidence", I don't think you can use the word "evidence."

Mr. Robinson: That calls for a conclusion.

The Court: Because that would leave for this witness to determine what was not evidence, Mr. Mitchell, wouldn't it?

Mr. Mitchell: I will withdraw that. May I have the exhibits to which your Honor was referring? Your Honor asked a question about distributions from the Security-First National Bank to Peter L. Ferry and Catherine B. Ferry.

Q. Why didn't you investigate that to determine what [457] the beneficiaries received under that trust?

A. The matter was never brought to my attention and it was immaterial.

The Court: No; that may go out that "it was immaterial."

Mr. Mitchell: I think he should be able to explain that, your Honor.

Q. What do you mean by "immaterial"?

A. We have no authority to make investigations of what happens before date of death particularly.

Mr. Mitchell: No; this is subsequent to the date of death, Mr. Eddy—oh, no; that is before date of death; that is right.

The Court: It is before.

A. We are to determine the return and values as of the date of death, and are not concerned except as it may

(Testimony of Nathaniel N. Eddy)

be directly related as to increases, and sometimes we consider those things. But I have never known of this at all. It was never brought to my attention in any manner.

The Court: Just a moment. Mr. Eddy, you testified that you found no evidence in your investigation that in these bank accounts there had been any contributions made by Mrs. Ferry and therefore you did not allow any part of that. You must have made some investigation before death to determine that, didn't you?

A. Only as of the date of death as to the amount in there and as to the testimony that I could get from her or [458] from others whether she did or did not.

The Court: But before? A. Yes.

The Court: That is an investigation before death. I just wanted to get the record clear that you did not limit yourself to the date of death and stop there.

A. Oh, yes.

Q. By Mr. Mitchell: Was there any limitation made in your investigation by the attorneys for the taxpayer or by the taxpayer or the family to the effect that the premiums should be traced back to these distributions of beneficial interests to the beneficiaries by these trusts?

A. No.

Q. Or that any of the moneys distributed to the beneficiaries by the trusts were used to pay insurance premiums? A. No.

Mr. Mitchell: That is all.

The Court: Cross examine.

(Testimony of Nathaniel N. Eddy)

Cross-Examination

By Mr. Robinson:

Q. Mr. Eddy, do you have here that case of Lang vs. Commissioner? A. Yes.

Q. When was that decided?

The Court: If you have the date, counsel, you can give [459] it. I don't know what the date was.

Q. By Mr. Robinson: It was decided after the time that you made the investigation, though, wasn't it?

A. I don't know that without looking it up.

The Court: Mr. Mitchell, what was the date of it?

Mr. Mitchell: I am afraid I can't give it. It is only about three years ago at the most.

The Witness: I can find it for you.

The Court: Oh, it is not necessary.

Mr. Robinson: Oh, it is not necessary. I can get it another way.

Q. Isn't it a fact that you had binding instructions from your superiors that, irrespective of the fact that a widow contributed anything from her separate property or from her interest in the community property to the payment of premiums, prior to the Lang decision, irrespective of that fact, that the policy stood in the name of the husband and he had the right in the policy to change the beneficiaries, that you could not take evidence as to the contribution of the wife; isn't that a fact?

A. I never have any instructions like that.

Q. What were your instructions?

Mr. Mitchell: A little louder, Mr. Eddy.

The Court: Never had any such instructions.

A. I never had any such instructions.

(Testimony of Nathaniel N. Eddy)

Q. By Mr. Robinson: What were your instructions prior [460] to the Lang decision on contributions of a surviving spouse to insurance standing in the name of a husband who died?

Mr. Mitchell: I assume counsel is asking for written instructions, no oral?

Mr. Robinson: I don't care what kind of instructions they were.

The Court: You are not limited, Mr. Mitchell, to either written or oral. You asked him "what instructions."

Mr. Mitchell: Oh, "instructions," that is right.

The Court: Proceed.

The Witness: I want to get the date of that.

The Court: I will get it for you right now. Proceed, counsel.

Mr. Robinson: Well, let us say prior to the Lang decision.

The Court: The instructions would be considerably different, so I think the witness should be entitled to refresh his memory as to the date; and I will have it in a moment for him.

Mr. Robinson: I will proceed with the examination and come back to it.

The Court: Yes; proceed.

Q. By Mr. Robinson: Did you ever see that James Newman decision? A. Yes.

Q. What did that decision hold, if you know? [461]

The Court: Now, counsel, this witness is not qualified as a lawyer to testify in those matters and you objected on that ground.

Mr. Robinson: No. But it is for the purpose of impeachment that I am bringing this out.

(Testimony of Nathaniel N. Eddy)

The Court: That would not impeach him, supposing he did not know what it was.

Mr. Robinson: He knows the decision.

Mr. Mitchell: I have absolutely no objection to this line of testimony.

Mr. Robinson: Very well, I will proceed, then, Mr. Mitchell.

The Court: The Lang case was decided on May the 16th, 1938. 1938, that was five years ago. I did not think it was that long.

Q. By Mr. Robinson: Do you know whether or not the Commissioner of Internal Revenue acquiesced in California in the Lang case?

Mr. Mitchell: Are you referring to the Supreme Court decision of the United States?

Mr. Robinson: The Supreme Court decision, the matter being certified from the Circuit Court of Appeals to the Supreme Court.

A. I don't think he did. I don't recall.

Q. You are sure that he did not? A. Yes. [462]

Q. Do you recall the case of McCoy vs. the Commissioner?

A. I have read the case. I don't remember now whether the Commissioner acquiesced in that or not.

Q. And that was subsequent to the Lang case?

A. Right.

* * * * *

Q. By Mr. Robinson: Do you know whether the Commissioner has acquiesced at the present time in the Lang case and the McCoy case?

A. Well, the law is changed now entirely about insurance.

(Testimony of Nathaniel N. Eddy)

Q. But up to the change in the present law isn't it a fact that the Commissioner had not acquiesced up to that time? A. I believe that is right.

* * * * *

The Court: Let me have this straight. Do you mean to tell me that a decision rendered by the Supreme Court of the United States was reviewed by the Commissioner of Internal Revenue?

Mr. Robinson: The Commissioner does not agree with the Supreme Court of the United States on this particular point.

The Court: And he refuses to follow it? He refuses to follow it? [463]

Mr. Mitchell: In explanation of that, the Lang case did not involve California community property, but the State of Washington.

The Court: But our Circuit Court is following the State of Washington, isn't it, and not California? Isn't our Circuit Court following the State of Washington?

Mr. Mitchell: In my opinion, it is. I would not say that the Supreme Court would so hold.

The Court: I would not, either, but I think we are familiar from the decision of the Circuit Court that it is not going to hold with California.

Q. By Mr. Robinson: Isn't it a fact, Mr. Eddy, in view of the fact that the Commissioner of Internal Revenue had not acquiesced in the Lang case that you were forced to follow the rules and regulations of the Commissioner? A. Certainly.

Q. And that, even though the wife had contributed money out of her separate property or out of her one-half vested interest in community property, you could not allow her a dime on that insurance; isn't that right? [464]

(Testimony of Nathaniel N. Eddy)

* * * * *

Q. Mr. Eddy, were you instructed by the Commissioner or his duly authorized agents to include in the estate of all decedents insurance upon the life of that decedent payable to named beneficiaries other than the estate of the decedent?

A. I can only answer that by saying that that was the regulations up at that time, and every case must stand on its own feet. I did not know what the facts were and they were not presented. I could not make a decision of whether I would have to recommend that way or some other way.

The Court: No.

Mr. Robinson: Would you read the question to the witness?

The Court: That is not clear. Just follow the question. It is immaterial now what the facts were. It is just a question as to instructions. Mr. Eddy, the reporter will read the question.

(Question read by the reporter.)

The Court: As a part of the gross estate.

Mr. Robinson: Right.

A. Where he paid the premiums; yes.

Q. Where he paid the premiums?

A. That is right.

Q. What were your instructions in the case where he had not paid all the premiums, but only a portion of the premiums? [466]

A. The general rule was that it made no difference who paid the premiums.

(Testimony of Nathaniel N. Eddy)

Q. That is right. You included it in the estate irrespective of who paid the premiums on his life, isn't that right?

A. If he had all the incidents of ownership, the right to borrow, mostly, or change beneficiary—if he had all the incidents of ownership, that is right.

Q. In other words, if he had the right under the terms of the policy to borrow upon the policy or to change the beneficiary, you included full value of the insurance in the gross estate irrespective who paid the premium, is that right?

A. After the deduction of \$40,000.

Q. After the deduction of \$40,000.

The Court: After the deduction of what?

Mr. Robinson: After the deduction of \$40,000.

Q. I call your attention in your letter of January 25, 1937—

Mr. Mitchell: What is the exhibit number?

Mr. Robinson: It is Exhibit No. 59 in evidence.

Q. —to the following language: You wrote this letter, did you not?

A. Yes.

Q. "Any community interest of the surviving spouse is not an allowable deduction. Jas. Newman decision Case 29 B. T. A. page 53." [467]

Isn't it a fact you were bound by the rulings of your Commissioner that you were to follow that case?

A. No; no, not the particular case.

The Court: A little louder.

A. No; not that particular case, that I recall. There was nothing ever said about what rules or what regulations that we are to follow, anything of that kind. An investigation has to be carried out and we will use our

(Testimony of Nathaniel N. Eddy)

own judgment as to the cases. They might not fit, universally fit all the needs.

Q. By Mr. Robinson: With the exception of the qualification that you have just made— A. Yes.

Q. —that if any of the ownership is in the decedent, that no matter who paid the premiums you included—

Mr. Mitchell: I think you interrupted the witness.

Mr. Robinson: I am sorry.

Mr. Mitchell: Did you finish your answer, Mr. Eddy?

A. To make a bald statement that we are given instructions as to how to handle a case, that is never done at all. We are left *carte blanche*.

Q. By Mr. Robinson: You are given certain rules, though?

A. Yes; a rule laid down to make that investigation and report it.

Q. Isn't it a fact that the Commissioner had acquiesced [468] in the Newman case?

A. I don't know.

Q. And was considering the Newman case and was relying thereon? A. I don't know.

Mr. Mitchell: I will stipulate that the Commissioner contended just the reverse of the tax commissioner in the Lang decision when he went to the Supreme Court, and that the contention made by the Government in the Lang case was the position then of the Commissioner and the Bureau of Internal Revenue.

Q. By Mr. Robinson: Let me ask you, Mr. Eddy, why did you put that statement in there that "Any community interest of the surviving spouse is not an allowable

(Testimony of Nathaniel N. Eddy)

deduction. Jas. Newman decision Case 29 B. T. A. page 53”?

A. That was to advise the executrix the grounds on which the claim was denied. That is one of the grounds on which it was denied. [469]

* * * * *

Q. By Mr. Robinson: Are you familiar with the fact that under the policies the decedent had the right to change the beneficiaries and that they were on his life and they are payable to named beneficiaries other than the estate?

A. Yes.

Q. Those facts, alone, were sufficient to justify you, without any investigation, to include those policies in the estate, isn't that right?

A. No. We must make the investigation as to the claims, no matter what the law reads.

Q. But assuming that you had found in this case that one-half of those premiums had been paid either from the separate property of Mrs. Ferry or from her one-half interest in vested community property, isn't it a fact that you would still have included that insurance in the gross estate?

A. I don't know what I would have done.

Q. You remember distinctly talking to Mr. James Ferry, do you, out at the place of business? A. Yes.

Q. His place of business? A. Yes.

Q. And you distinctly remember that he said that his [470] father, on December 8, 1934, had given him the stock in the Glendale State Bank so that he could carry on his position in the bank employ? A. Yes.

Q. You distinctly remember that?

A. That is my best recollection I have of it.

(Testimony of Nathaniel N. Eddy)

Q. You are not sure? It could not be possible that that stock was given to Mr. Peter Ferry, Jr., could it have been? It could not have been possible that you talked to Mr. Peter Ferry, Jr., out there?

A. I think I talked to him, too.

Q. Do you know which one told you that the stock had been given to James?

A. Not unless it is in the report. The facts are in the report. I can't tell absolutely. That is so long ago, over six years, that it is impossible to remember.

The Court: Was that stock part of the estate, Mr. Mitchell?

Mr. Mitchell: No, your Honor; it was not taxed.
[471]

* * * * *

Q. By Mr. Robinson: I want to call Mr. Eddy's attention to page A-23 of the Federal Estate Tax Return, the last paragraph on the page.

A. Well, I was simply confused with the names. It probably was Peter.

* * * * *

Q. By Mr. Robinson: What investigation did you make to find out what separate property Mrs. Ferry had contributed to the six trusts in question?

The Court: Aside from his conversations with Mr. Blum, I don't think we ought to go into that question.

Mr. Robinson: No.

The Court: Aside from those conversations with Mr. Blum, let us find out if there was anything else.

A. Well, the matter was discussed with Mr. James L. Ferry, the oldest son, at the office over in San Fernando.

(Testimony of Nathaniel N. Eddy)

He seemed to know more about it than anyone else and I talked to him about that and— [472]

Q. By Mr. Robinson: Who did you talk to—

Oh, pardon me. Was there something else? I am sorry.

A. And Mrs. Ferry, at her home, and probably Peter Leo Ferry. I have made that statement here—I would not make it if it was not true—and that was regarding the stock; and as to what Mrs. Ferry did, that she was a housewife and left everything to her husband; and inquiry was made and nothing furnished to me that she had.

Q. I see. But you did not make the inquiry as to Trust No. — A. I did make the inquiry.

Q. You did make the inquiry? A. Yes.

Q. As to Trust No. 6204—I believe that was created some time about 1930—who did you inquire of or what investigation did you make as to Mrs. Ferry's contribution from community property acquired after July 29, 1927?

A. None in specific, just took them as a whole.

Q. When you were asking about the separate contribution, you asked about the community type of funds as to each of the trusts at that time? A. Yes.

Q. Who did you talk to regarding Mrs. Ferry's contribution from her separate property and from vested community property, that is, community property acquired after July 29, 1927, to the payment of insurance premiums? [473]

A. I did not discuss it with her.

Q. Did you discuss it with Mr. Blum?

A. Possibly.

(Testimony of Nathaniel N. Eddy)

Q. You may have?

A. Possibly I may have and may not have, because—

Q. Do you recall whether you discussed it with either of the young Mr. Ferrys?

A. I doubt very much if I did.

Q. Because of this Lang case and because of the ruling of the Commissioner, why, it would have been an idle act? [474]

A. No; not at all. I was waiting and—everything was predicated upon the executrix, who had the proper channels of furnishing me with some evidence that I could investigate. Not having received it—

Q. Was the evidence—

Mr. Mitchell: Wait a minute, wait. Let the witness answer the question.

A. Not having received it, there was nothing to investigate.

Q. By Mr. Robinson: Or, if you did receive a little, it was not sufficient, isn't that right?

A. Well, that is right. In other words, we can't make the case for the executrix.

Q. Will you turn to your notes, Mr. Eddy, in regard to the furniture? A. Oh, yes.

Q. Will you read that sentence right there, from your notes? Read it out loud.

A. "Decedent's widow made no claim to said furniture and is all recommended as taxable." Is that what you mean?

Q. Yes. Did you ask her whether it was hers, or what?

A. That pertains to the furniture that I taxed. I don't recall now whether—

(Testimony of Nathaniel N. Eddy)

Q. Was there some furniture you did not tax at that time?

A. I don't recall. In most instances—I have so [475] many, many cases that I don't recall.

Q. You may have divided it up and taxed part of it and just left part of it go as belonging to the widow?

A. I couldn't say.

Q. Depending, in some cases, you do, and some cases you don't?

A. That is right. I was told that he purchased the property.

Q. But you don't go into the facts of what funds it came from, or anything of that nature?

A. Well, that she contributed no separate funds; yes. Oh, I went into that. I didn't go half-cocked into it.

Q. To what extent did you go into that?

A. I can't tell. As I recall, I questioned her as to who contributed the funds for the purchase of this furniture and who paid the taxes, who paid the insurance, and getting a reply that Mr. Ferry did, I made an inventory and appraised the property that was considered his at the time.

Q. Do you remember examining their income tax returns?

A. No; I do not, because I have no record of it, and not having a record I couldn't say whether I examined the income tax returns or not. It was not necessary without the data that I wanted.

Q. In other words, you wanted to be able to trace the particular dollar into the payment of a particular policy of insurance, isn't that right? [476]

A. That is what we would do.

(Testimony of Nathaniel N. Eddy)

Q. That is the practice and custom of your office; unless money can be earmarked and traced right to the dollar, why, you can't allow anything?

A. Well, hardly that severe.

Q. But almost that severe, isn't it?

A. But pretty strict about it.

Q. Do you recall what that letter was, that last letter that Mr. Blum wrote you?

A. No; except I can tell you what he said in substance.

Q. No; you do not need to go into it. I think maybe I don't want to meet an objection.

Mr. Mitchell: If counsel wants to know the contents of the letter, I am sure the witness remembers it.

Mr. Robinson: We have a copy of it. We will bring it in.

The Court: They must have a copy of it.

Mr. Mitchell: Of course.

The Witness: It was just another promise.

Q. By Mr. Robinson: You naturally read the entire Form 706—is that Exhibit 2?

Mr. Mitchell: That is Exhibit 2.

Q. By Mr. Robinson: —Exhibit 2 in this matter, before you made your investigation, didn't you?

A. Every item in it on the original form. We get the original Form 706. [477]

Mr. Robinson: I believe that is all.

Re-Direct Examination

By Mr. Mitchell:

Q. Mr. Eddy, how is your office divided? Do you specialize in estate tax cases only? A. Yes, sir.

(Testimony of Nathaniel N. Eddy)

Q. And just what is the set-up of the Internal Revenue Office in respect of different types of taxes?

A. The office embraces the income tax field, audit investigation, and it is all under the income tax unit. It is divided into the income tax field, audit and investigation, and estate tax field, audit and investigation.

Q. Are they separate divisions of the Internal Revenue Agent's office? A. Yes.

Q. Has each a separate head?

A. No. Well, each has a chief of a group.

Q. That is what I mean, yes.

A. But an agent in charge over the whole unit, as an income tax unit.

Q. Yes. And have you ever had occasion in estate tax investigation to look at certain income tax returns?

A. Oh, yes.

Q. In what instances do you do that?

A. In cases where we want to trace or determine income and how it is split up, or between husband and wife [478] or what-not. Wherever it is—

Q. You answered Mr. Robinson's question concerning an investigation, tracing premiums back to their original source, that you could not do that without certain data. What data do you refer to now in that answer?

A. Any data that would be approved under the facts. Generally speaking, it is the income tax records, although they are infallible.

Q. You mean they are not infallible?

A. I mean they are fallible. We just can't—we get those as a means of starting, and bank records, checks, canceled checks.

(Testimony of Nathaniel N. Eddy)

Q. You said the reason you did not look at the income tax returns in this case was because you were waiting for certain data? A. That is right.

Q. Just what data were you waiting for, and what was the source?

The Court: Now, let him answer one.

Mr. Mitchell: All right.

The Court: Let him answer one at a time. What data were you waiting for?

A. Any data that could prove its point.

The Court: What point?

Q. By Mr. Mitchell: To whom do you refer when you say "he"? [479]

A. That there was community property and everything that is contained in that complaint, in that claim for refund. I don't know what data he could furnish.

Q. I see. That is the data you were waiting for?

A. That is right.

* * * * *

Mr. Robinson: On that, before we excuse him, we had the matter of that Leslie report. Would you rather have me bring the original over from court, Mr. Mitchell?

Mr. Mitchell: I don't know. Do you want to introduce the Leslie report still?

Mr. Robinson: It would be excess to use it and it seems a shame to take all that time to put in the testimony, but I believe it should be in the record as far as accrued interest items are concerned.

The Court: Just the report with reference to the accrued interest is all you are asking, isn't it?

Mr. Robinson: That is right.

(Testimony of Nathaniel N. Eddy)

The Court: Mr. Mitchell, would the evidence end there?

Mr. Mitchell: I just don't know, your Honor. [480]

* * * * *

The Court: I am saying to make your objection, but suppose he brings a certified copy here and lets you make your objection and the Court permits it to go in. I want your objection to be exactly the same as you want it. You say you will still object if it is certified?

Mr. Mitchell: Yes. Not on the ground of the foundation, your Honor.

The Court: That is what I want.

Mr. Mitchell: The grounds of the objection have already been stated.

The Court: Yes; very fully stated.

Mr. Mitchell: And counsel offers the copy. I don't object to it on the ground that it is a copy, if he assures me it is a true copy.

The Court: Yes.

Mr. Mitchell: I will object to it on the other grounds stated.

Mr. Robinson: I will offer it again, only that part of it, only that portion of the Leslie report that shows available for distribution interest and accrued interest.

The Court: I don't want all that in the record. If you will now make a copy of the parts that you want and give a copy to the government, it will be understood, then, that [481] that will be admitted subject to the objection.

Mr. Robinson: And subject to any corrections that you might find.

(Testimony of Nathaniel N. Eddy)

Q. By Mr. Mitchell: And, Mr. Eddy, those figures just mentioned are correct, are they?

A. The figures that I gave, yes. That includes income and all that; but I want to say this: Those figures are not the same figures in that inventory appraisal by Mr. Leslie. There is a slight difference.

Q. By Mr. Robinson: Because of the changes already in your letter?

A. That is right. Oh, those figures are correct, correct as recommended by me, and I do not exactly agree with those.

Mr. Robinson: May this be withdrawn as an exhibit for that purpose?

* * * * *

CATHERINE B. FERRY,

the plaintiff herein, was recalled and testified further as follows: [482]

Cross-Examination

(resumed.)

Mr. Mitchell: Mr. Reporter, can you find the last question that was asked Mrs. Ferry at the end of yesterday's proceedings?

(Last previous examination of Mrs. Ferry read by the reporter.)

By Mr. Mitchell:

Q. Parcel 34 from the Twin Lakes Park Company. Do you recall where the funds came from with which to purchase that property?

(Testimony of Catherine B. Ferry)

Mr. Robinson: I object to the question as asked and answered.

The Court: Let her answer it again if she can. Do you remember?

A. That, I take it, was some work of Mr. Ferry, some contract he had.

Q. By Mr. Mitchell: Do you remember when that work was done? A. Oh, I wouldn't remember.

Q. The deed was dated 1929, October. The deed by which Mr. Ferry and you acquired it was dated October 28, 1929. Does that refresh your memory?

A. No; I wouldn't remember.

Q. Do you recall whether it was acquired by means of a foreclosure, or a mortgage, or trust deed?

A. Oh, were you waiting for me to answer? [483]

Mr. Mitchell: I did not hear your answer.

A. I didn't answer. Well, I think that was for work. Mr. Ferry used to do work and then take some of the land for payment.

Q. Do you remember when the work was done for that particular parcel?

A. Oh, I wouldn't know; no. Only I would say '28 or '9, as far as I could—

Q. I can't hear you.

A. I would say '28 or '9, as far as I could remember.

Q. Do you recall now visiting any other properties described here in your stipulation of facts with Mr. Ferry? A. What do you mean? This property?

Q. Yes; the property that you were looking at yesterday, those 38 parcels. A. Yes; I recall.

Q. Which one?

A. Well, that Watts subdivision, where that was.

(Testimony of Catherine B. Ferry)

Q. I call your attention to your estate tax return, Exhibit 2, Page A-3, a piece of property which you returned at \$200 value in the Descanso Tract, the south 50 feet of Lot 13. Do you recall visiting that property with Mr. Ferry before it was purchased?

A. I think that was in Tujunga.

Q. That would be north of Glendale?

A. Yes. [484]

Q. Or in Glendale itself, would it?

A. No. It would be out.

Q. Just out of Glendale. You remember that property, do you? A. Yes.

Q. But do you remember visiting the property before it was purchased? A. Yes; I remember that.

Q. What do you remember? What funds were used to purchase that property?

A. No; I don't remember.

Q. Why did you return that as belonging 100 per cent to Mr. Ferry?

A. Well, I will tell you. Mr. Ferry always fixed out my taxes.

Q. This is after Mr. Ferry died when you returned it as belonging to him.

Mr. Robinson: I don't believe she understands you. She thinks you were referring to the income tax.

Mr. Mitchell: No; I am referring to the estate tax.

Q. By Mr. Mitchell: You see, this is your estate tax return which you verified after Mr. Ferry's death before Vera E. Fay, a notary public, and this is a certified photostatic copy of it. You recall signing that, don't you, Mrs. Ferry? A. Yes; I recall signing it. [485]

(Testimony of Catherine B. Ferry)

Q. Probably at your attorney office, at the office of your attorney, perhaps?

A. I have always had Mr. Doner (?) fix up the taxes. I gave him all the data.

Q. You gave Mr. who? A. Doner.

Q. The death tax?

A. Are you talking about the death tax?

Q. I am still talking about the estate tax which is the death tax, you know.

A. And what was the question?

Q. This Descanso property which you reported as belonging to Mr. Ferry, and I believe you testified you did not know where the funds came from with which that was purchased?

A. Well, it was purchased during his life.

Q. Yes; of course, I understand that.

A. Well, then, it came from our funds.

Q. You don't remember what bank account the money was drawn on? A. No; I don't.

Q. Or when? Do you remember when the property was purchased? A. Not exactly.

Q. How long before he died was that piece of property purchased? [486]

Mr. Robinson: I object to the question as asked and answered. She has testified she does not know when it was purchased.

Mr. Mitchell: I am trying to help her remember.

The Court: There must be some records to show that. I don't suppose any witness would know the dates of the purchase of 58 pieces of property.

(Testimony of Catherine B. Ferry)

Q. By Mr. Mitchell: I will ask the question this way, then: Was it purchased before July, 1927?

A. Well, I couldn't say because we had, I think, several lots in there and I wouldn't be able to say whether this was.

Q. It may have been purchased before, or it may have been purchased after? A. Yes.

Q. Now I ask you why you reported in your return, this death tax return, that it belonged 100 per cent to Mr. Ferry, instead of half to him and half to you?

Mr. Robinson: May I ask a question on voir dire?

Mr. Mitchell: I don't think it is necessary on this question, your Honor, on voir dire.

The Court: I don't know what the question is. I will permit the question to see whether it is proper.

Q. By Mr. Robinson: Do you know why any figures that are in that entire return were put in there?

A. In this tax? [487]

Q. Federal estate tax return?

A. Why they were put in?

Mr. Mitchell: I will withdraw that question.

The Court: All right.

Q. By Mr. Mitchell: Mrs. Ferry, after Mr. Ferry died did you employ a firm of attorneys to help you in the probate of his estate and the matter of his estate tax, the death tax? A. Yes; I did.

Q. What firm did you employ?

A. Freston and Files.

Q. And Mr. Wetzler who is sitting here handled the matter for you?

A. Mr. Wetzler handled all the matters.

(Testimony of Catherine B. Ferry)

Q. Did you give him all of the information concerning the estate at that time, the property that belonged to Mr. Ferry? A. Yes; we did.

Q. Was this one of the pieces that you turned over to him as belonging to Mr. Ferry?

A. I guess it was. I couldn't turn any other over only what—

Q. You told your attorneys, then, that you and Mr. Ferry were partners and he owned half and you owned half, didn't you?

A. Yes; I told them half was mine. [488]

Q. And you told them, of course, that you and Mr. Ferry had entered into a partnership agreement in 1906?

A. No; not at that time because—

Q. When did you tell them that the partnership agreement had been entered into?

A. Well, the first one that ever asked me was Mr. Robinson.

Q. And when was that?

A. About eight weeks ago, or something.

Q. Why didn't you tell Mr. Wetzler?

A. Well, I never thought of it as important, because I thought the trusts all took care of that. What was in the trusts was half mine.

Q. Did you think that this Descanso lot was in the trust? A. Well, I wouldn't say that. I mean—

Q. Did you know that it was not in the trust?

A. Well, I don't really remember that lot now. I can't answer definitely.

Q. You thought the declarations of trusts created a partnership; is that what you mean?

A. No. I mean that I thought that was the—well, I would say, to witness that we were partners.

(Testimony of Catherine B. Ferry)

Mr. Mitchell: Will you read that answer?

(Answer read by the reporter.)

A. I never even thought of telling our conversation [489] until Mr. Robinson asked me.

Q. What did he ask you?

A. If I could remember back any conversations.

Mr. Mitchell: I see. Will you read the first part of that answer, please, to the previous question, Mr. Reporter?

(Record read by the reporter as requested.)

Mr. Mitchell: I will ask now for a certified copy of Mr. Ferry's will. We offer into evidence a photostatic copy of the decedent's will, Peter L. Ferry's will, dated May 10, 1930, a certified copy, or this is a photostat of the certified copy, certified by L. E. Lampton, Clerk of the Superior Court of Los Angeles County, California, filed July 8, 1935, admitted to probate July 31, 1935, and the certificate is dated June 1, 1936.

* * * * *

The Clerk: That will be Government's Exhibit C, in [490] evidence.

(Thereupon, the document referred to was marked Government's Exhibit C, and received in evidence.)

[Note: Defendant's Exhibit C will be found in the Book of Exhibits at page 847.]

Q. By Mr. Mitchell: I hand you, Mrs. Ferry, Defendant's Exhibit C, which purports to be a certified copy of Mr. Ferry's will. The will is dated May 10, 1930. Did you make out a will at the same time in practically the same language as that? A. Yes, sir.

(Testimony of Catherine B. Ferry)

Q. Will you take your time and read it over and see the date and so on?

Mr. Robinson: I object to the question as being compound.

The Court: Well, I think the witness understands it.

Mr. Robinson: I further object to the question upon the ground it is not the best evidence.

Mr. Mitchell: Evidence of what?

The Court: Of her will.

Mr. Robinson: You have asked her for her will, if her will has the same contents as this one.

Mr. Mitchell: I will merely ask her whether she made one out at the same time. I will withdraw the former question.

The Witness: Are you waiting for my answer?

Mr. Mitchell: Yes.

Q. Did you make out a will? Do you notice the date?

A. Yes; May, 1930. [491]

Q. May 10, 1930? A. Yes.

Q. All right. Now you may answer.

A. Yes; I did.

Q. And where is that will?

A. Well, I guess it is destroyed that I made out.

Q. Have you made another one since then?

A. Yes.

Q. Then you always destroy the old will when you make a new one? A. Yes.

Q. I believe you testified yesterday? A. Yes
[492]

(Testimony of Catherine B. Ferry)

Q. By Mr. Mitchell: To the best of your ability, what were the contents of the will?

A. That I would leave to him whatever interests I had.

Q. Who drew the will; who typed it, prepared it?

A. I couldn't say.

Q. When did you first see that will and how did you happen to see that will, in the first place? Where did you get it?

A. Well, we were getting ready to take a trip.

Q. In May, 1930?

A. Yes. And I remember him bringing in these wills.

Q. Mr. Ferry brought the two wills into the home, you mean to your home? A. Yes.

Q. Did you read his will before he signed it?

A. Well, I always read everything, but I can't say I really understood everything I read.

Q. You understood your will, didn't you, that you made? A. Yes.

Q. You can't recall anything except that you willed him your half of partnership property, is that right?

A. That is right.

Q. And you did will him half of your partnership property. Did you call it "partnership property" in the will? [493] A. I wouldn't remember.

Q. You will note that Mr. Ferry—I will try to refresh your memory—Mr. Ferry declared, in the second paragraph of his will: "I declare that all property now owned or possessed by me is community property of myself and

(Testimony of Catherine B. Ferry)

my wife, CATHERINE B. FERRY, * * *” Did your will contain a provision like that second paragraph?

A. Well, I wouldn't be able to say, because I don't remember.

Q. Did you name your children in the will?

A. Yes; I would name my children.

Q. I will ask you then, what the difference was between your will and his will, if any, outside of the name of the beneficiary or devisee and legatee? When I say that I mean, for example, Mr. Ferry leaves everything “to my wife, CATHERINE B. FERRY, and I hereby give, devise and bequeath to my said wife,” all property, etc. What difference was there between them?

A. I wouldn't know as there would be any. I wouldn't think there would be any difference, as much as I remember.

Q. Except he was named, you should think they were in probably the same language that he used in his will, don't you think? A. Yes; I would think so.

Q. Who is Fred H. Bushel, of Glendale, 1847 Lake Street, who signed the will as a witness? [494]

A. That is a man that worked for Mr. Ferry.

Q. And H. M. Ehrke? He resided in Verdugo City.

A. He was also an employee of Mr. Ferry's.

Q. Did those two gentlemen also witness your will?

A. Yes.

Q. Was your will shorter or longer than this will, or the same length?

A. I think it was about the same, as far as I remember.

Q. About the same length; but you don't remember who drew these two wills? A. No; I don't.

(Testimony of Catherine B. Ferry)

Q. Do you recall the will now that was made in 1919, or the two wills that Mr. Ferry made at that time?

Mr. Robinson: 1918.

Mr. Mitchell: Or, 1918. Thank you for the correction.

Q. Those two wills, did they read about practically the same, each one?

A. Yes. Well, I don't remember, but I would think they would read the same.

Q. Was your will which was signed at the same time as this will, defendant's Exhibit C, in effect at the time when Mr. Ferry died? A. Yes.

Q. You are sure that that will was destroyed?

A. Mine?

Q. Yes. [495] A. Yes; because I—

Q. When was it destroyed? Excuse me. Go ahead and finish your answer.

A. Well, I haven't seen it around and when I made the new, I just imagine we destroyed the old one.

Q. Over the week-end will you please make a search and endeavor to find it, and if you can, bring it in with you next Tuesday morning?

A. I will, but I am almost sure I won't find it because I have my later will. I know where it is.

Q. Did you, at the time you conferred with Mr. Wetzler concerning the death tax, tell him some of the premiums which went to pay for life insurance on the life of Mr. Ferry, that a portion of the premiums were paid with your separate funds? [496]

* * * * *

A. With my separate funds?

(Testimony of Catherine B. Ferry)

Q. By Mr. Mitchell: Yes; any separate funds that belonged to you personally outright.

A. Well, I just took in everything and told him, and I just don't remember.

Q. You don't remember whether you told him that or not? A. I don't really know.

Q. What is the last?

A. I couldn't say. I can't remember. I just remember of going in and giving him all the details.

Q. At the time you were sent to the office of Ralph W. [497] Smith and Claude I. Parker, whom did you contact in that office, if anyone, regarding your claim for refund that was filed in this case?

Mr. Robinson: I object to the question as assuming facts not in evidence.

Q. By Mr. Mitchell: Well, were you ever in the office of Claude I. Parker and Ralph W. Smith? Ralph E. Smith, is it?

Mr. Robinson: Ralph W.

Mr. Mitchell: W.

A. I have been in the last two months.

Q. Only during the last two months?

A. I can't remember of being there other than the last two months.

* * * * *

Q. By Mr. Mitchell: Do you remember receiving some letters from Washington, Mrs. Ferry, about this date, shortly after August 4, 1937, addressed to you at your North Chevy Chase, Glendale, home, from D. S. Bliss, Deputy Commissioner in Washington, D. C.?

A. Well, I wouldn't remember the date but I remember [498] getting—

(Testimony of Catherine B. Ferry)

Q. Some letters. What did you do with those letters?

A. Well, I guess I have them.

Q. You still have them; you did not turn them over to your attorney?

A. All of them, I may have turned them over.

Q. Who was your attorney at the time in 1937?

Mr. Robinson: I object to the question as incompetent, irrelevant and immaterial. The question neither tends to prove nor disprove any issues in this case. The letter came to Mrs. Ferry and I have it in my possession now, and here is the letter. How it got there is immaterial.

Mr. Mitchell: And B and C?

Q. You do not recall to whom that you turned that letter over that your counsel has just handed to me, that is, originally? A. I don't recall.

Q. Do you recall what you did with any of the letters?

Will counsel stipulate that she turned them over to her attorney?

Mr. Robinson: I don't know. I know the attorney has them now. I don't want to stipulate to immaterial facts.

Mr. Mitchell: Are you associated in this case, Mr. Wetzler?

Mr. Wetzler: I am not an attorney of record as far as I know. I am the attorney for the estate. [499]

Mr. Mitchell: I don't like to go to the trouble of putting you on the stand. If you know what the facts are, it may save us a lot of time.

Mr. Wetzler: I can make my statement and then counsel can stipulate to it. Naturally, any documents pertaining to the estate would be forwarded to Mrs. Ferry and Mrs. Ferry would forward to me, because obviously she was unfamiliar with it.

(Testimony of Catherine B. Ferry)

The Witness: It may be that my son had taken them in. He always helped me out on this matter.

Mr. Wetzler: Of course, ordinarily the government sent documents to me. Why they would send it directly to her, I don't know. But I know it would be sent to me immediately after it was received.

Q. By Mr. Mitchell: Do you know a lawyer in Claude I. Parker's office by the name of Mr. Blum, B-l-u-m? Did you ever meet him?

A. I had some letters and—

Q. Letters from him?

A. I think I did, but I don't remember meeting him.

Q. You never discussed this with him?

A. My sons took care of some of those matters for me.

Mr. Mitchell: When will James be back?

Mr. Robinson: Mrs. Ferry will know.

The Witness: I think the middle of June.

Q. By Mr. Mitchell: I call your attention to the [500] refund claim that is open before you at this time, Exhibit E attached to the stipulation of facts, and ask you whether you ever saw the original of that?

Mr. Robinson: Mr. Mitchell, are you questioning her signature?

Mr. Mitchell: Her signature does not appear on it, I don't think.

Mr. Robinson: On the original refund claim?

Mr. Mitchell: On the exhibit.

Mr. Robinson: (Indicating on document to Mr. Mitchell.)

Mr. Mitchell: Excuse me. Her signature is here.

(Testimony of Catherine B. Ferry)

Q. Will you examine that, please, Mrs. Ferry, and see if you recall signing it, and where you signed it?

Mr. Robinson: I will stipulate, Mr. Mitchell, that it was not signed in the office of Freston and Files, nor the office of Claude I. Parker and Ralph W. Smith.

Q. By Mr. Mitchell: Do you know who Hermina M. Hannam, the notary public who took your affidavit is?

A. Yes. She is at the First National, or she was then at the First National Bank of Glendale.

Q. Does that refresh your memory? A. Yes.

Q. As to the place where you signed it?

A. Yes.

Q. How did you happen to have it in your possession?

A. My son may have brought it, or it may have come [501] through the mail.

Q. You read it, of course, before you swore to it, did you? A. Yes.

Q. Did you notice that it contained no reference to a partnership agreement between yourself and your husband, the refund claim?

A. I never did think of it in that way.

Q. You were not surprised that it was not in there, were you, at the time?

A. Well, I couldn't say that I was surprised.

Q. Did it occur to you at all when you read it that it had been omitted? Did that enter your head at all at the time? A. No; it didn't.

Q. I will ask you now whether you were surprised when you read the refund claim because it contains no statement to the effect that some or part of the premiums

(Testimony of Catherine B. Ferry)

for the life insurance upon the life of Mr. Ferry were paid with your separate funds?

A. I just don't understand the question.

Q. I might state it this way: the refund claim states that the premiums, some of the premiums, a portion of the premiums on the life insurance policies were paid with community funds acquired since July 29, 1927. It does not contain a statement that any of the premiums were paid [502] with your separate funds. Did that fact surprise you, the omission?

Mr. Robinson: I am going to object to the question as calling for a conclusion of the witness, incompetent, irrelevant and immaterial whether or not she was surprised.

The Court: I think that is true. I do not see what you can make of her surprise.

Q. By Mr. Mitchell: I will ask you why, then, you did not make the correction before verifying it? Did you know what the claim was to be used for? You read it, of course?

A. Yes; I read it and my son would read it with me and when I think he thought it was all right, I would depend more on him than on my own judgment.

Q. You did not suggest to your attorneys that it be changed in any way, shape or form, did you?

A. No.

Q. Do you recall your interviews or interview with Mr. Eddy, who was on the stand this afternoon and this morning, a revenue agent?

A. I remember of him being at my home; yes.

Q. Did you tell Mr. Eddy at the time he called in December, '36, or January. '37—did you tell him that

(Testimony of Catherine B. Ferry)

you and your husband had entered into a partnership contract at any time, or a partnership agreement?

The Court: Now, Mr. Mitchell, is this cross examination? [503]

Mr. Mitchell: This is cross examination, your Honor. [504]

* * * * *

Q. I hand you a return here for the calendar year 1928, your exhibit No. 46, of income received by you in 1928. Did you ever file an income tax return before the year 1928, before this one?

A. Well, I wouldn't remember.

Q. You just don't remember? A. No.

Q. Why don't you remember, Mrs. Ferry? Do you remember [507] you filed one for 1942?

A. Income? Oh, yes; I surely did.

Q. In 1941? A. Yes.

Q. And '40? A. Yes.

Q. And '30?

A. I do remember ever since Mr. Ferry died, because I had more responsibility in getting them prepared.

Q. You paid little attention to it before that?

A. No. He attended to most all of that.

Q. I see, he did all of that. He would bring you the return and ask you to sign it? A. Yes.

Q. That was always done before his death?

A. He would always have me read it, even if I didn't understand it.

Q. It was not until after his death that you took the responsibility yourself? A. No.

* * * * *

(Testimony of Catherine B. Ferry)

Q. Did you file a gift tax return in 1925, at the time the first four trusts were created? [508]

A. No.

Q. I can't hear.

A. Not that I ever remember of signing.

Q. You referred to many deposits made in certain banks, and I believe you stated that you had the right to draw on some of those bank accounts? A. Yes.

Q. And that certain checks received from the trust companies under the trusts were deposited in those banks?

A. Yes.

Q. Did you ever draw a check on the joint tenancy account, or those joint tenancy accounts to pay—I believe you said that any checks received, Mr. Ferry had a rule that they had to be deposited?

A. Yes; that nothing was ever—a check was never to be taken and cashed.

Q. It was not to be cashed; it was to be taken and deposited. Then what would you do? Draw a check on the account? A. Yes. [509]

Q. Wherein it was deposited? A. Yes.

Q. And for what purpose did you draw checks? Did you draw checks to buy food, cash checks to buy food?

A. Yes; and I remember paying some of the insurance.

Q. Did you draw any checks to pay for the upkeep of the home? A. Yes.

Q. And did you keep a record of your half that went for that purpose and Mr. Ferry's half that went for that purpose? A. No; I didn't.

(Testimony of Catherine B. Ferry)

Q. In other words, you used both halves?

A. Yes.

Q. And is the same true when you went to buy clothing for the children and yourself? A. Yes.

[510]

* * * * *

Q. By Mr. Mitchell: I ask you whether Mr. Ferry ever objected to that, or was that an understanding between you? A. Objected to what?

Q. Or did he ever object to the fact that you were using half of your funds to spend on the family expenses?

Mr. Robinson: I object to that question as calling for a conclusion of the witness. It does not show which half of the funds she was using. She testified she drew checks.

Mr. Mitchell: On both halves.

Mr. Robinson: On the back account. It speaks for itself.

The Court: Can you get any more out of it, Mr. Mitchell? The money was deposited in the bank and they drew checks against it. What more can you do about it?

Mr. Mitchell: My thought is to determine whether or not the decedent's obligations, personal obligations, were paid out of both halves of the fund which this plaintiff claims were owned by her as her separate property.

The Court: Why, yes; she says that. She says they issued checks to pay all these bills and they came out of that account. I don't know what more you can get out of that.

Q. By Mr. Mitchell: There was no limitation to the amount that could be spent for discharging Mr. Ferry's obligations, was there?

A. Of what limit do you mean?

(Testimony of Catherine B. Ferry)

Q. Any amount, in amount? [511] A. No.

Q. You never questioned what he spent, did you?

A. No.

Q. To satisfy his obligations, financial obligations?

A. No.

Q. And that is true of the money spent to educate the children when they were under 21?

A. Well, it all came out of our funds.

Q. And no division made, that is, is was not all charged to him? A. No.

Q. You had no objection to this rule about depositing all checks in the bank, did you?

A. None whatever.

Q. Whether they were checks made to you or checks made to him? A. No.

Q. You never protested? A. No.

Q. To him about it? A. No.

Mr. Mitchell: I think that is all of the cross examination.

Re-Direct Examination

By Mr. Robinson:

Q. Mrs. Ferry, regarding all these transactions that [512] you have had with the office of Freston & Files, and Mr. Wetzler and the office of Claude I. Parker and Ralph W. Smith and with Mr. Blum or myself, have you more or less left all the legal matters up to your attorneys? A. I surely have. [513]

* * * * *

Los Angeles, California, Monday, June 7, 1943.
10:00 a. m.

(Case called and announced ready.)

Mr. Mitchell: Mr. Burkey, will you take the stand, please?

NOEL A. BURKEY,

called as a witness by and on behalf of the defendant, being first duly sworn, was examined and testified as follows:

The Clerk: Your full name?

The Witness: Noel A. Burkey.

Direct Examination

By Mr. Mitchell:

Q. Mr. Burkey, are you an Internal Revenue agent in the estate office and gift tax division in the Los Angeles office? A. I am.

Q. How long have you been in that office as revenue agent, the Los Angeles office? A. Since 1926.

Q. And have been so specializing in estate and gift taxes during that period? A. I have.

Q. I hand you, Mr. Burkey,—counsel is examining the document—by the way, are you a conferee in that office? A. I am.

Q. Were you during the year 1940? [515]

A. Yes, sir.

Q. Did you ever hold a hearing as a conferee in the matter of the refund claim of Peter L. Ferry, Decedent?

A. Yes, sir.

Q. I hand you, Mr. Burkey, packet of papers, letter-size, the top sheet of which is dated in type "January 30, 1937", entitled in the upper left hand corner "MT-ET District of 6th California Estate of Peter Ferry Date of death: June 16, 1935," and signed "George D. Martin," in the lower right hand corner of the top page, "George D. Martin, Internal Revenue Agent in Charge." The last document in this packet of papers is a letter addressed to Catherine B. Ferry, Executrix, 3030 N. Chevy Chase, Glendale, California, dated October 18,

(Testimony of Noel A. Burkey)

1940, consisting of two pages and signed "Guy T. Helvering Commissioner." And I ask you whether you recognize these documents? A. They are our office file.

Q. Are they the official files of your office?

A. Yes, sir.

Q. Always retained by your office in such cases?

A. Yes, sir.

Mr. Mitchell: We offer this document into evidence as Defendant's next exhibit in order.

Mr. Robinson: May I ask a question on voir dire?

The Court: Yes.

Mr. Mitchell: Yes. [516]

Q. By Mr. Robinson: These documents are almost all carbon copies, are they not?

A. Almost all, perhaps.

* * * * *

Q. By Mr. Mitchell: Are these the confidential files that are customarily kept by the Internal Revenue agent in Los Angeles? [517]

* * * * *

The Witness: Yes.

* * * * *

Mr. Mitchell: I will withdraw that question. And I might state, in answer to counsel's objection to the offer, that the purpose, of course, is to establish that the new contentions and grounds raised at the trial were not considered by the Commissioner; and that the position of [518] plaintiff that the Commissioner, through any of his agents, has waived the variance between the refund claim and the suit by considering these new grounds, does not exist; that is, that the new questions were not con-

(Testimony of Noel A. Burkey)

sidered by the department and the defense of the variance thereby waived. And in order to do that it is necessary, of course, to prove a negative fact, to introduce all of the files in this case. Whether they are the files of the technical staff, whether they are the files of the revenue agent, or whether they are the files from the Commissioner's office in Washington, all will have to be introduced to negative the contention now made by the plaintiff that the defense of variance was waived by the Commissioner.

The Court: Mr. Mitchell, what evidence on the part of the plaintiff is there here that the Commissioner waived that? I do not recall any testimony on the part of the plaintiff.

Mr. Mitchell: Counsel has not stated the purpose of his various offers and has not been compelled to do so. Ordinarily the argument in support of—if counsel will state now in open court that he will make no contention in his brief, after trial, or at any other time in this case, that the Commissioner waived the contentions made by defense counsel in this case throughout the trial of this case, objecting to offers and motions to strike, this evidence naturally will be wholly unnecessary. [519]

The Court: The point is, I do not recall any testimony, Mr. Mitchell, that has been tendered here by the plaintiff that the matters that you are mentioning were considered by the Commissioner. We have the Commissioner's letters, they are clear, and that is all that we have, and they state the grounds upon which he decided these questions. We did have a question here as to whether or not income was included and that was all clarified by showing that the Commissioner—and also testimony of the Government—considered, in my opinion, the income and the corpus itself

(Testimony of Noel A. Burkey)

as "corpus." There is no question about that in my mind, from the standpoint of the figures put down; and we had the two questions determined in the matter and he fixed the total amount in that. Whether you call it a waiver, or acquiescence, or consent, or what you call it, that is the only one. I do not know of any other position here where the Commissioner has considered these other matters which you are now mentioning. If there is, I would like to have it pointed out to me because there is not in my notes.

Mr. Mitchell: I am inclined to agree with your Honor, but I have no assurance that counsel will not argue that they have been waived, perhaps, by me. I don't know. Here are his new contentions: First, that there was a partnership agreement between the spouses.

The Court: Yes.

Mr. Mitchell: Second, that the income on hand in the [520] trust at the time of death belonged to the beneficiaries and was not a part of the taxable estate; and third, that separate funds of the wife were used to pay insurance premiums.

Those three contentions are not stated in the refund claim; and if counsel will state that he will not rely upon waiver, at any time in this case, of the variance between the present contentions and the contentions made before the refund claim was rejected, I will not and I might not have to offer this evidence, of course. The fact that they were not considered by the Commissioner is very material in view of those facts. Evidence has gone into the record now in this suit and by this record as to prove the negative—this record is offered to prove the negative fact, that none of those ultimate facts were called to the attention

(Testimony of Noel A. Burkey)

of any agent of the Government before this suit was commenced. They are very voluminous and it is the first time in my experience that I ever felt it necessary to introduce the confidential records of the Government; but in view of the evidence that has gone into the record, I deem it my duty to offer it.

I might state that the penciled notations are not offered as part of the record. They are penciled notations made by me before I thought or knew that it would be necessary to offer the file. I might also add that the record is not offered for the purpose of proving the truth of any of the facts recited.

(The Court examined proffered documents.) [521]

* * * * *

The Court: No; between Melcher, Head, Estate Tax Division.

* * * * *

I will admit the exhibit for the limited purpose offered, that the confidential files do not show that there was any discussion by the Commissioner of the grounds suggested by counsel.

However, as I state again, I do not recall any evidence in the plaintiff's case, but for that limited purpose the exhibit will be admitted. Proceed. That will be Defendant's [522] Exhibit D.

(The document referred to was marked as Defendant's Exhibit D, and was received in evidence.)

[Note: Defendant's Exhibit D will be found in the Book of Exhibits at page 849.]

(Testimony of Noel A. Burkey)

Q. By Mr. Mitchell: I call your attention, Mr. Burkey, to document entitled "Report of Hearing", dated "Los Angeles, California, June 19, 1940," and ask whether you were the author of this report of hearing?

A. I was.

Q. Do you recall that hearing? A. Yes, sir.

Q. Who was present at the hearing?

A. The hearing was first set and Mr. Blum and Ralph Smith were attorneys of record, and it was requested that the hearing be postponed to a time certain and it was, and at that time certain Mr. Blum asked that the case be considered on the record.

Q. What record did you have before you at that time?

A. The claim for refund, the report of the investigating officer and—

Q. Did you have before you the estate tax return?

A. Yes, yes.

Q. Did you have before you the protest which is attached to the file, the 1940 protest?

A. You are referring to the one that was filed previously to the date of this order or shortly prior to the date of this order? [523]

Q. No. I am speaking of the protest dated April 5, 1940. A. Yes, sir.

Q. And what else, if anything, did you have before you at the time?

A. The report of the investigating officer.

Q. Who was the investigating officer, or do you recall?

A. Mr. Eddy.

Q. Who attended this conference? Did Mr. Blum attend?

A. No. As I stated, there was no conference. It was waived.

(Testimony of Noel A. Burkey)

Mr. Mitchell: Oh.

Mr. Robinson: I move to strike "it was waived" from the record, being a conclusion.

The Witness: All right.

* * * * *

Q. By Mr. Mitchell: Just give us the approximate time [524] of this conversation with Mr. Blum.

A. Well, at 10:00 a. m. Tuesday, May 21, 1940, at the time at which the hearing was to be had, Mr. Blum asked that it be continued—

Q. Now, wait a minute. Where was he and where were you when that question was asked?

A. I think that was over a telephone.

Q. All right.

A. I was in the Federal Building.

Q. Do you know Mr. Blum's voice?

A. Oh, yes.

Mr. Robinson: O.K.

Q. By Mr. Mitchell: All right. Now state the conversation, please.

A. He said that at that time he was busy and could not appear at the hearing and asked that it be continued until the 22nd.

Q. Of the same month?

A. Of the same month; and his request was granted, but on the 22nd he called by telephone, stating that he desired the case to be considered on the record as submitted. And due to our practice, we must have a hearing, but he said he would waive that formal hearing.

Q. Did you ever have an informal hearing—

A. That was the one.

(Testimony of Noel A. Burkey)

Q. —with Mr. Blum? [525]

A. No, no. I would say no.

* * * * *

Q. By Mr. Mitchell: Do you recall the last question [526] or would you like to have it read?

A. It was, I think the question was, whether or not Mr. Blum submitted any evidence relating to an alleged partnership agreement between husband and wife.

Q. That is right.

* * * * *

Q. By Mr. Mitchell: There was no conversation, was there, Mr. Burkey, other than what you have related or have testified to?

A. That is all. I am sure that is all, because, you see, had there been any— [527]

* * * * *

The Witness: At each of these conference hearings, even though new evidence—evidence not previously in the file appeared in the protest or in the claim for refund, if that new evidence was even intimated by counsel, assume that he would say “I have got evidence touching so and so I want to submit,” we would hold the case up until he submitted that; and I am sure that he said nothing to me about a partnership agreement between the husband and wife. Had he done so I am sure I would have developed it at that time.

Q. By Mr. Mitchell: By investigation, you mean?

A. By a new investigation. Probably it would have been directed to Mr. Eddy to check into that theory of a partnership.

(Testimony of Noel A. Burkey)

The Court: Yes. And, Mr. Mitchell, is there any evidence here? Mrs. Ferry herself has stated that the first time she mentioned that was some eight weeks before this trial.

Mr. Mitchell: I believe that is correct, your Honor.

The Court: So I do not believe we need to go into that.

Mr. Mitchell: All right. [528]

Q. By Mr. Mitchell: Was any contention made by Mr. Blum that the cash on hand in the trusts at the time of Mr. Ferry's death were not includable in the gross estate because they belonged to the beneficiaries?

Mr. Robinson: I object to the question. The record is in and the evidence, and they speak for themselves. Mr. Burkey has testified he had no further conversations, which shows he relied entirely on the record. That record will speak for itself as to what it is.

The Court: Now read the question, Mr. Reporter.

Mr. Mitchell: I am attempting to prove a negative fact, your Honor, and I think the specific question is permissible. I asked the same question of Mr. Eddy and the witness was permitted to answer over counsel's objection.

The Court: Was there any testimony here on the part of the plaintiff that Mr. Blum had made such a request? I do not remember it.

Mr. Mitchell: No, your Honor; but evidence was introduced as to the amount of cash on hand at the time of Mr. Ferry's death.

The Court: That is right.

Mr. Mitchell: And counsel, naturally, is now going to contend that it is not includable in the gross estate because it belonged to the beneficiaries.

(Testimony of Noel A. Burkey)

The Court: Aren't we bound by the two instruments, the claim and the amendment to the claim? Can we read anything [529] into them that is not there?

Mr. Mitchell: No; I don't think we can, your Honor, but that can be waived. Even though it is not mentioned in the claim and not mentioned in an amended claim, if any, the Commissioner can waive the absence of such ground in the claim, and this evidence goes to establish that it was not waived. I can waive it. The Government actually, during the course of the trial, can waive it, and in the absence of objection it would have been waived.

I desire to plug in the loopholes and establish that it was not waived by any agent of the Government at any time who had anything to do with this case.

The Court: Yes. That gets back to the point of where is the contention or where is the communication from the Commissioner or from yourself or any of the agents that it had been waived. First, that it had been claimed; and secondly, that it had been waived.

Mr. Mitchell: I can't get counsel to commit himself as to whether or not he is going to contend that it was waived. Naturally, I—

The Court: I am not interested in counsel's contention. I am interested in just the evidence that has been presented, Mr. Mitchell.

Mr. Mitchell: Very well.

* * * * *

Q. By Mr. Mitchell: I will ask you this question, Mr. [530] Burkey: At the time you had this matter under consideration as a conferee were any facts called to your attention relating to the separate ownership by Mrs. Ferry of any of the funds that went to pay life insurance

(Testimony of Noel A. Burkey)

premiums—separate ownership as distinct from community ownership?

A. Nothing, excepting those statements relating to those matters in the protest, in the claim for refund, and the agent's report.

Q. That is all?

A. That is all. There was no specific evidence—there was no evidence of those matters as submitted by Mr. Blum at the time of hearing.

Mr. Robinson: I move to strike everywhere the word "evidence" appears, unless we can agree they are facts.

Q. By Mr. Mitchell: I am referring to facts called to your attention.

The Court: Yes, just facts.

The Witness: The answer would be the same.

The Court: All right.

Mr. Mitchell: I think that is all.

Cross-Examination

By Mr. Robinson:

Q. Mr. Burkey, either prior to the hearing or prior to your rendering your memorandum decision in this matter, you naturally read the protest in this matter, didn't you?

A. Yes. [531]

Q. That is, the protest dated in 1940? A. Yes.

Q. Dated April 5, 1940, apparently was received by your office on April 4, 1940. Did you also, by any chance, read the protest dated October 29, 1937? Read the language in paragraph third, on page 2 of this protest, and see if it refreshes your recollection.

A. I have no independent recollection of it.

Q. However, don't you believe that in view of the reference on page 2 of the protest of April 5, 1940, that

(Testimony of Noel A. Burkey)

you not only read, but you also considered the protest of August 4, 1937—I mean of October 29, 1937?

A. What were the issues raised in that early protest?

The Court: You examine it with counsel there.

The Witness: Were they the same as they were here?

The Court: No.

Mr. Robinson: I will ask you, Mr. Mitchell, to produce the protest of October 29, 1937.

Mr. Mitchell: That will be produced as soon as the files arrive from Washington, Mr. Robinson.

The Witness: Evidently and apparently that was not in the file at that time.

Q. By Mr. Robinson: Are you changing your testimony now?

A. I mean it was not a part of this file. That protest—

Q. I say, the protest of 1937 was not in the file and [532] therefore you did not consider it?

A. It may be it was not.

Q. Do you mean you rendered your decision without considering—

A. No. I will tell you, when that claim came in we would get the administrative file from Washington and that would have been in there and I read it. That is a fact; I would study everything in that record.

Q. You read the protest of October 29, 1937?

A. Yes, sir.

Q. And considered that?

A. Yes, sir; because that was in the administrative file and we would have to do that.

(Testimony of Noel A. Burkey)

Q. Did you take into consideration in rendering your decision in this matter the separate income of Mrs. Ferry for all years from 1927 to 1935, inclusive?

A. The amounts of that income was neither proven nor shown to have been invested in any of the property in this estate.

Q. But you did take into consideration the fact that she had had separate income throughout these years, isn't that right?

A. It was alleged that she had, but the amounts—

Q. But you did not get confirmation of the amounts?

A. No.

Q. But you knew that the contention was being made that [533] she had separate income?

A. That is right.

Q. And that this separate income had gone towards the contribution towards the trusts and also towards the insurance policies, isn't that right?

A. This claimed that it was, but that was the trouble with the case, that there was income from her—well, from the community, that went into the life insurance policies and—

Q. Did you—

Mr. Mitchell: Just a minute. I don't think the witness is finished.

Mr. Robinson: Oh, I am sorry, I am sorry. I did not mean to interrupt you, Mr. Burkey.

The Court: Give the witness the last few words of his answer.

(The record was read by the reporter.)

The Witness: There was no evidence showing—

(Testimony of Noel A. Burkey)

Q. By Mr. Robinson: You mean "facts" by the "evidence", is that right?

A. No facts showing, in the first place, how much there was and how much went into these insurance policies or in any other property that was included in the gross estate.

Q. For example, as to the trusts, they were unable to show to you the identical dollars of her separate properties that went into these trusts, is that right? In other words, [534] they could not trace her separate contributions to these trusts, is that right?

A. I think that is a proper answer; that they could not trace any dollar, any asset in this estate,—

Q. Did you make any—

Mr. Mitchell: Just a minute. Let the witness finish.

Mr. Robinson: I am sorry.

The Witness: —these properties, or facts upon which we could predicate a decision of any part of the property that had been included in the decedent's gross estate had been furnished or contributed by Mrs. Ferry. That was the—of course, that was the case. That was their allegation.

Q. By Mr. Robinson: Did you make any investigation—

A. No.

Q. —of the contention that Mrs. Ferry had separate income for the year 1928 of \$31,068.38?

A. What do you mean by "income"?

Q. As disclosed by her income tax return?

A. She paid an income tax on a net income of \$31,000—

Q. \$31,068.38.

A. Now, your question was what?

(Testimony of Noel A. Burkey)

Q. Did you take into consideration or did you make any investigation relative to that?

A. No; I did not.

Q. And naturally, you made no investigation of her separate income as alleged in the protest for the other years, [535] I don't imagine?

A. No. The statement was made that she had certain incomes which went into these properties. She could have had these incomes. There is no—we had no quarrel with those statements. We wondered, though, just how much of that money of hers was in these properties and we couldn't find any. We just eliminated it.

Q. You could not trace her separate property, then, into the insurance policies or into any of the properties that were included in the gross estate?

A. That is right.

The Court: I think, counsel, you have two—not to confuse the witness—the testimony shows that, in the segregation of these trusts, that is, when the properties were first put in the trust, Mrs. Ferry testified that she had no separate property and she had no separate income, in dollars and cents, except on the theory of oral statements at the time of the marriage that they were to divide their properties. Aside from that, there was no inheritance, there was no gift, there was no money that came to her that was a part of the corpus of the trusts. I think that is clear.

The second question that we do not want to confuse the witness is that after the establishment of the first trust, in 1926, approximately—

Mr. Mitchell: '25.

The Court: —1925, and from then on Mrs. Ferry did [536] receive very large income. And that is matter

(Testimony of Noel A. Burkey)

that I have been trying to get something a little more definite on, that income and what disposition was made of it.

The Witness: It is my recollection, your Honor, and I suppose the records shows here, that that went into joint bank accounts.

The Court: That is right; that is the testimony of Mrs. Ferry, that all of the checks that she received were endorsed by her and went into this one account.

The Witness: And because of that fact, it was impossible to trace out of that bank account dollars of hers into the assets here in this estate. As I recollect, that was the issue, one of fact, one of pure fact, and they did not prove their case; so our office refused adjustment and sent the case to the technical staff for consideration, upon the request of Mr. Blum.

The Court: And that is where he asked to have it submitted on the record? No formal hearing?

The Witness: That is right.

* * * * *

Mr. Robinson: I have no further questions of Mr. Burkey.

Re-Direct Examination

By Mr. Mitchell:

Q. Mr. Burkey, you were asked on cross examination whether you investigated the income reported by Mrs. Ferry [537] in her 1928 income tax return. Why didn't you investigate that?

A. The investigation was done by Mr. Eddy and all I was, was a reviewing officer. There was no evidence submitted by Mr. Blum or the estate in connection with that.

(Testimony of Noel A. Burkey)

Mr. Robinson: I move to strike the word "evidence."

Q. By Mr. Mitchell: Do you mean "facts"; there were no facts? A. There were no facts.

Q. You also were asked on cross examination to what extent you considered or investigated any separate property of the wife that went into any of the trusts. I will ask you whether anyone, including Mr. Blum or any agents of the Government or any members of the Ferry family, ever suggested to you that separate property went into one of the trusts by virtue of joint tenancy deeds of the spouses to real estate? I will withdraw that and ask—no; I won't withdraw it.

The Court: I thought we had copies of all the deeds in the stipulation?

Mr. Mitchell: They were, your Honor, and my first objection went to those particular deeds.

The Court: Can you change them? Aren't they just what they are?

Mr. Mitchell: I do not desire to change them, your Honor. [538]

The Court: Do they not speak for themselves in the stipulation, Mr. Mitchell?

Mr. Mitchell: There is nothing in the stipulation to the effect that they were called to the conferee's attention at the time they came before him.

The Court: Do you mean he did not examine any of the trusts when they were examining in this case, to find out what created the trusts?

Mr. Mitchell: The joint tenancy deeds did not create the trusts, your Honor.

The Court: Some kind of a deed created the trust that went into it.

Mr. Mitchell: Oh, yes. The stipulation stipulates—

(Testimony of Noel A. Burkey)

The Court: That these deeds created the trusts that are in the stipulation.

Mr. Mitchell: No, your Honor.

The Court: Let me get that straight.

Mr. Mitchell: The stipulation is to the effect that Mr. and Mrs. Ferry acquired certain real estate by joint tenancy deeds. Plaintiff is now contending—and, by the way, we objected to that portion of the stipulation of facts on the ground that it was not supported by the refund claim or the protest or any other ground or contention heretofore made by the taxpayer to the effect that property owned in joint tenancy by the spouses went into Trust 6204. That was argued at some length and your Honor admitted the [539] evidence; and I am endeavoring now to show that that type of separate ownership, joint tenancy ownership, was never even suggested to the revenue agent or to any other agent of the Government before the commencement of this action.

The Court: My recollection of Mrs. Ferry's testimony is that the title to these properties was in her husband; that he managed it; that he bought it. I did not get any testimony here at all that any of this property was in her own name or in the name of her and her husband.

Mr. Mitchell: That is in the stipulation of facts.

The Court: That is in the evidence and that is Mrs. Ferry's testimony. And I was just wondering what this was meeting.

Mr. Mitchell: The stipulation of facts contains evidence to the effect that the spouses acquired certain real estate by joint tenancy deeds; that they thereafter transferred to the trust No. 6204 the real estate which the spouses held by virtue of joint tenancy deeds at the time of acquisition, thereby endeavoring to establish that one-

(Testimony of Noel A. Burkey)

half of the property that went into the trusts was the separate property of Mrs. Ferry and therefore she was the donor to the extent of one-half of that particular property.

It is the objection of the Government, which was made on the first day of the trial, that the evidence was not admissible because the refund claim alleged that the property that went into all of the trusts, half of it was Mrs. Ferry's [540] property because of a property settlement agreement between her and her husband evidenced merely by the creation of the trusts. As an attorney, I would gather from that, that it was old type community property and that the taxpayer was endeavoring to establish that it was transformed from old type community property into some type of co-ownership, tenancy in common; that there was a property settlement agreement that was evidenced only by the creation of the trusts; and that if Mrs. Ferry made a contribution of any separately owned property it was property which she held in common with her husband by virtue of a property settlement agreement.

Now, in the trial, after the commencement of the suit, filing of the complaint and amended complaints, counsel offered evidence, a portion of the stipulation of facts, to the effect that Mrs. Ferry contributed one-half, was the donor of the trust to the extent of one-half, by virtue of two things: One, a partnership, an oral partnership between the spouses; and second, in respect of Trust 6204, joint ownership as a joint tenant with her husband.

We offer this evidence in order to establish that the contention or ground or ultimate fact that Mr. and Mrs. Ferry owned certain real estate as joint tenants was never made in the refund claim or in the complaint in this case before; and it was not considered by any agent of the

(Testimony of Noel A. Burkey)

Government at any time. Your Honor admitted the evidence and we now [541] offer to establish that it was not waived by being considered.

The Court: The record, to me, is clear, and Mrs. Ferry so testified, first, that the properties that were accumulated were all in the name of her husband. Now, there is no other testimony against that which in any way conflicts with that.

Mr. Mitchell: Except the stipulation of facts which is signed by counsel for both parties, based on many, many deeds which I examined before I made the stipulation. The fact is in evidence. I don't think Mrs. Ferry endeavored to vary the agreement, or her counsel, on that point.

The Court: The stipulation, in my opinion, is not going to control the sworn testimony in the court, Mr. Mitchell, and is not going to—

Mr. Mitchell: I have no recollection of Mrs. Ferry saying that all property stood in Mr. Ferry's name. Do you, Mr. Robinson?

Mr. Robinson: I believe she testified that she had inherited nothing and she never earned any money of her own other than through Mr. Ferry, the two of them together.

Mr. Mitchell: I think the evidence shows clearly that all property is traceable in title to the husband, of course, and he might have made a gift to her.

The Court: He might have, but there is no evidence of it.

Mr. Mitchell: Yes; of course it is, your Honor. I your Honor, pages 18 through 23, I believe.

(Testimony of Noel A. Burkey)

The Court: That raises another question. Now, let us [542] examine that. As I understand the testimony, it is to vary the names of the grantees in these deeds.

Mr. Mitchell: To vary?

The Court: Yes.

Mr. Mitchell: No, your Honor. Which testimony did your Honor refer to?

The Court: For instance, "that said Parcel 4 was acquired under a Bargain and Sale Deed from William Griffin and Fannie Griffin, his wife, also known as Fanny Griffin, to Peter L. Ferry and Catherine B. Ferry, his wife, as joint tenants with right of survivorship, under date of April 12, 1922; which said deed was recorded in the office of the County Recorder of Los Angeles County on April 26, 1922."

Isn't that a correct statement?

Mr. Mitchell: Yes; of court it is, your Honor. I would not have stipulated to it had it not been correct.

The Court: And "that said parcel 5 was acquired under Four Grant Deeds from Pacific Southwest Trust & Savings Bank to Peter L. Ferry and Catherine B. Ferry, husband and wife as joint tenants; the deed covering Lot 3 of said Parcel 5 being dated the 21st day of November, 1924, and recorded in the office of the County Recorder of Los Angeles County on December 30, 1924; the deed covering Lot 10 of said Parcel 5 being dated the 10th day of November, 1924, and recorded in the office of the County Recorder of Los [543] Angeles County on the 11th day of December, 1924; * * *."

Mr. Mitchell: That was all stipulated to rather than offering the deeds so that it would shorten the case, your Honor.

(Testimony of Noel A. Burkey)

The Court: Yes. It is stipulated, then, that the title to these properties was taken by Peter L. Ferry and Catherine B. Ferry, as joint tenants; that is correct, isn't it?

Mr. Mitchell: Oh, yes. Yes, your Honor.

The Court: The evidence you seek now, Mr. Mitchell, what is the purpose of this evidence? These seem to be all joint tenant deeds.

Mr. Mitchell: Those that are listed, of course.

The Court: That are listed; yes. What is the purpose of this testimony?

Mr. Mitchell: To show that no claim was ever made in the refund claim to the Government or any of its agents, or in the protest, and that Mr. and Mrs. Ferry both contributed to the extent of 50 per cent each the property that went into Trust No. 6204 by virtue of the ownership of the property in joint tenancy, to establish that that question was never suggested to the Government in considering the refund claim and is not alleged in the complaint, to show that it was never considered by the Government and the absence of the contention in the refund claim waived by the Government. [544]

I might perhaps make it clearer, your Honor, by an illustration. This rule to the effect that refund claims must first be passed on by the Commissioner before suit can be brought, in order to minimize litigation, and requiring that the taxpayer state all of the grounds and all of the facts, in detail, in support of the grounds, is, of course, to minimize litigation. It is analagous in some respects to the statute of limitations. A party might have a bona fide grievance growing out of a breach of contract, but if that party does not bring his suit within the time limited by the statute, the applicable statute, he is

(Testimony of Noel A. Burkey)

barred from bringing the suit. Hardship sometimes results from the statute of limitations, and in the suits for refund hardship sometimes results. Under the statute of limitations that hardship arises out of procrastination, possibly, of the taxpayer and the taxpayer's counsel, or, rather, the litigant and the litigant's counsel in this case. In a suit for refund hardship might result from procrastination or from failure to state the ground upon which the claim for refund—the ground that is brought out in the suit, that was not brought out and presented and considered by the Commissioner, regardless of the reason for the delay and the reason for the omission to allege that ground so that the Commissioner might pass on it is, of course, immaterial. The rule is there and, as I say, sometimes results in hardship. I do not know whether I have made by point clear to your Honor [545] or not.

It is an arbitrary rule, of course, but it is the policy of the Congress that refund claims must be first passed upon by the Commissioner, before a court has jurisdiction to entertain a suit upon an alleged refund claim. However, like the statute of limitations, it can be waived. Just as the statute of limitations may be extended by actions such as fraudulent concealment of the opposing parties' cause of action, so the ground that the claim for refund does not state a ground that is later brought up may be waived by the Commissioner, or a ground that is not stated in the claim for refund may be waived by the Commissioner by conduct, the conduct being the consideration of another ground, a ground other than that stated in the claim for refund.

And this evidence goes to establish the fact that it was not waived in this case by the Government or any of

(Testimony of Noel A. Burkey)

its agents. The purpose is precisely the same as the question propounded to the witness concerning the suggestion of the fact of the partnership, the suggestion or consideration of the contention or ground that the income in the trusts at the time of death was not includable because it belonged to the beneficiary, another ground that was not made in the refund claim or in the complaint. The purpose is precisely the same as the purpose of the offer of Defendant's Exhibit D. [546]

* * * * *

Mr. Mitchell: Your Honor says: close his eyes to what the examiner found?

The Court: Yes.

Mr. Mitchell: No; of course not. He decides a case upon all the facts presented in the report of the investigator or examiner. But my thought is this: that where the taxpayer says to the Commissioner in writing, both in the tax return and in the claim for refund, that this property was acquired during marriage and therefore it is California community property, the fact that the taxpayer contends that it became the wife's separate property, as a tenant in common, by virtue of a property settlement agreement entered into by virtue of the conduct of the spouses in creating the trust, if I were the Commissioner I certainly would not spend weeks and weeks and weeks searching the records to determine in whose name that property stood. [549]

The Court: Well, you wouldn't have to. It seems to me that it would be the Commissioner's duty, first, to go into a trust and find out how the trust was created. I should think that would be his duty.

Mr. Mitchell: The declarations of trust were all attached to the estate tax return.

(Testimony of Noel A. Burkey)

The Court: Yes.

Mr. Mitchell: Exhibit 2.

The Court: Now he finds out that here is a trust which has certain real estate in it. Well, he determines, "All right; where did this property come from?" Well, here is the title.

Mr. Mitchell: No; he wouldn't do that. He would not be interested because he would take the taxpayer's word for that, your Honor, as to where it came from.

The Court: He only takes the taxpayer's word for something that is against the taxpayer.

Mr. Mitchell: Oh, no, your Honor.

The Court: But if the taxpayer told him something that was in his favor, he wouldn't take it. That is the position he took, from your statement. In other words, if the taxpayer tells him something and he sees that is "in my interest" that is true, but if the taxpayer tells him something that is "in his interest," then it is not true.

Mr. Mitchell: I think the revenue agents have already testified that if the taxpayer had even suggested—of [550] course, the trust could not suggest—

The Court: Here is another point, Mr. Mitchell: You say it was never called to his attention. Now, suppose a taxpayer makes a mistake on the law as to what kind of property it is—well, let me make it clearer. Suppose that I buy a piece of property with someone else and put in my check for \$10,000, he puts in his check for \$10,000, and the record so shows, and it is put in both our names, a half interest of each—

Mr. Mitchell: You are referring to real estate?

The Court: To real estate. —and one of the parties dies, so the other party says, "This is all owned by the man that died." And the Commissioner examines the

(Testimony of Noel A. Burkey)

deeds and the checks and he sees what the facts are; and he says, "Fine. I will tax it all to the fellow that died." And you say, "Well, but Mr. Commissioner, we have gone into this and we find that that is not correct, and you knew it when you examined it."

"I know, but you said it was all owned by the party that died. I know the facts are that he only owned half and that he paid for half, but that doesn't interest me at all."

Mr. Mitchell: That does interest him. The situation which your Honor presents is quite different from the situation here. We will take A and B, who purchase property and take title in their names, and 15 years later they join in transferring this property to a trust, and then, years later, [551] one of the grantors, donors of the trust, dies, and the revenue agent goes to the trust and is interested in what the property is and what the taxpayer says about the property. They are husband and wife. He knows that the law of California is that the wife must join in the transfer of real estate, regardless of whether it is old type community or new type community. He knows that the property was transferred to the trust, and the taxpayer says that property belonged to the husband.

Now, what difference does it make if the taxpayer concedes that it belongs to the husband and that it went into the trust as property of the husband, whether the other ones joined in it or not, then certainly the revenue agent would be discharged if he wasted his time going through the records which do not show in the trust. All the trust records show is that A and B, his wife, transferred property to the trust.

The Court: That property that was held by them in joint tenancy?

(Testimony of Noel A. Burkey)

Mr. Mitchell: No, your Honor. The trust records do not show that.

The Court: Do you mean to say the deeds do not show that in the trust records?

Mr. Mitchell: No, your Honor.

The Court: In other words, he is not interested in the creation of the trust, how it was created? [552]

Mr. Mitchell: Yes, he is, your Honor; and he has been told by the taxpayer how it was created. He has been told that it was old type community property and that the wife joined in the transfers.

The Court: Then he must have checked that up to find out if that was true or not, didn't he, and he found out it was not true?

Mr. Mitchell: It was immaterial.

The Court: If it is community property, then we are through, aren't we?

Mr. Mitchell: No, your Honor.

The Court: They told him it was community.

Mr. Mitchell: It was 1925—

The Court: I know, but they told him it was community property, didn't they?

Mr. Mitchell: Yes, your Honor.

The Court: He did not accept that, did he?

Mr. Mitchell: Yes; he did, your Honor.

The Court: That it was community property?

Mr. Mitchell: That it was old type community property acquired prior to 1927.

The Court: Amendment was made to the protest, wasn't it?

Mr. Mitchell: Amendment,—well, that is a matter for your Honor to decide. You mean an amendment of the refund claim by filing a protest?

(Testimony of Noel A. Burkey)

The Court: Yes: That was also considered by the [553] Commissioner?

Mr. Mitchell: Yes.

The Court: And he replied to that?

Mr. Mitchell: To the extent that this witness has testified.

The Court: Well, also to the extent of the evidence we had in before, here, that was a reply to that protest.

Mr. Mitchell: I don't think that Mr. Eddy had anything to do with that protest.

The Court: No. But we had attached to the complaint here the reply to that amended protest. It was amended on April the 5th, 1940.

Mr. Mitchell: That is the contention of plaintiff.

The Court: Well, but the Commissioner acknowledged it by replying to it and stating his position on it.

Mr. Mitchell: If your Honor will look at the document to which your Honor refers, October, 1940, I think you will find that the protest is not amended.

The Court: October, 1940. Now let us find that.

Mr. Mitchell: But regardless of whether the claim for refund was amended by the protest, your Honor, the protest does not anywhere refer to the joint tenancy deeds, neither does the complaint.

The Court: This letter from the Commissioner, Mr. Mitchell, the amended protest, was dated April the 5th, 1940.

Mr. Mitchell: The protest? [554]

Mr. Robinson: The amended protest.

The Court: The amended protest.

Mr. Mitchell: The so-called amendment.

The Court: Yes; 1940. Could you call my attention to the letter of October 18th?

(Testimony of Noel A. Burkey)

Mr. Mitchell: I haven't it before me.

The Court: Exhibit E.

Mr. Mitchell: Attached to the stipulation of facts?

The Court: Exhibit E.

Mr. Mitchell: I can find that pretty quick. Exhibit E is the refund claim. Exhibit F is the letter.

The Court: October 18, 1940?

Mr. Mitchell: October 18, 1940.

The Court: Yes.

Mr. Mitchell: Yes, your Honor.

The Court: Your contention is that this letter of October the 18th, six months after the amended protest of April the 5th, 1940, was not considered by the Commissioner; is that correct, Mr. Mitchell?

Mr. Mitchell: The witness has already testified that he did consider that protest, your Honor.

The Court: I can follow the position that if the Commissioner has no notice or his agents have no notice of certain facts at all, until they are submitted at the time of the trial, entirely new grounds, that they should not then be injected into the suit to try it on an entirely [555] different theory. I am a little concerned with the fact that, where the Commissioner has open to him all of the files and the records and the trusts, and then if the taxpayer mistakenly names a kind of property that is in the trust, that he can close his eyes to the true facts of it.

Mr. Mitchell: When the property went into the trust, your Honor, it was no longer joint tenancy property.

The Court: When it went into the trust?

(Testimony of Noel A. Burkey)

Mr. Mitchell: The title was in the trustee then.

The Court: Yes; that is true, but the beneficiaries were these people in the proportions that are set forth.

Mr. Mitchell: Yes.

The Court: So, if the decedent then only owned half of it—

Mr. Mitchell: Before it went in?

The Court: Yes. —and owned half of it in the trust, then he should be taxed for half of it, shouldn't he?

Mr. Mitchell: No. He didn't own half of it in the trust. He was a trustor with the right to revoke and was also a beneficiary to the extent of one-eighth in most of the trusts, all but one, and in the other one he was a beneficiary, had a life beneficiary to the extent of a half in the income. [556]

The Court: But the Commissioner's position is that, in view of the fact that he had the power to revoke or change it, the title did not vest?

Mr. Mitchell: That the gift was not complete; that is right. That is the ultimate—

The Court: Result.

Mr. Mitchell: —ultimate issue in the case.

The Court: That is right, of these steps. But he only had a control, in any instance. If the deeds that went in to create the trust were joint tenancy deeds, then he only had half of it, isn't that correct?

Mr. Mitchell: Well, that is a question that we propose, of course, to argue after the case is submitted.

(Testimony of Noel A. Burkey)

The Court: Yes. Just so, as we go along, we can all get in mind what the issues are, because, I take it the only thing that we are interested in is trying to get at, really, what the law is that applies, at least the Court has no other interest.

Mr. Mitchell: Can the Court pass on this one question?

(Question read by the reporter as follows:

"You also were asked on cross examination to what extent you considered or investigated any separate property of the wife that went into any of the trusts. I will ask you whether anyone, including Mr. Blum or any agents of the government or any members of the Ferry family, ever suggested to you [557] that separate property went into one of the trusts by virtue of joint tenancy deeds of the spouses to real estate? I will withdraw that—no; I won't withdraw it.")

The Court: I will permit the question.

A. There was no fact submitted showing that jointly owned property went into this trust.

The Court: As I understand, Mr. Burkey, you did not make any investigation yourself? A. No.

The Court: Of any of these facts; you were one of the reviewing officers? A. That is all.

The Court: That looked into the record as it came to you? A. Yes, sir. [558]

* * * * *

Los Angeles, California, Monday, June 7, 1943.
2:00 p. m.

Mr. Mitchell: Will Mr. Ducker take the stand, please?

HUGH L. DUCKER,

called as a witness by and on behalf of the Defendant,
being first duly sworn, was examined and testified as
follows:

The Clerk: Your full name, please?

A. Hugh L. Ducker, D-u-c-k-e-r.

Direct Examination

By Mr. Mitchell:

Q. Mr. Ducker, are you in the employ of the government?
A. I am.

Q. Were you ever in the office of the technical staff in
this district, Los Angeles, California?
A. Yes.

Q. In what capacity?

A. Assistant technical adviser.

Q. Just what were your duties, briefly?

A. To hear protests of taxpayers and their representatives and decide the merits of the cases presented.

Q. How were they presented? By whom were they presented to the technical staff?

A. Usually by the accredited representatives of the taxpayers.

Q. Were any referred to you by the Commissioner—I mean by the Internal Revenue agent? [559]

A. Yes.

Q. Do you recall reviewing the matter of refund claim or protest in the matter of the estate of Peter L. Ferry?
A. I do.

(Testimony of Hugh L. Ducker)

Q. Do you recall what files or records were before you at that time, without looking at them?

A. Well, I would not say that I recall all of them. Substantially, I do.

Q. I will hand you your files in just a moment. How long have you been with the Bureau of Internal Revenue?

A. About 19 years.

Q. And prior to being an adviser with the technical staff what were your duties? What was your office?

A. I was an internal revenue agent.

Q. Were you attached to the California office of the Internal Revenue agent in charge? A. No.

* * * * *

Q. By Mr. Mitchell: I hand you, Mr. Ducker, a folder containing a number of sheets, letter-size, and the folder is entitled "Ferry Estate, Peter Los Angeles, California Claim", and then on the outside of the folder it reads "Office File Records Section Technical Staff, Los Angeles", and ask you whether you have ever seen this folder and its [560] contents before? A. I have.

Q. And in what connection?

A. As assistant technical adviser on the technical staff I handled this case.

Q. Do you recall how it arose? Was it on a refund claim or on a protest, or both?

A. It was on a claim for refund supported by a protest.

Q. Did you hold a hearing? A. I did.

Q. Where was this hearing held?

A. Held in the office of the technical staff in Los Angeles.

Q. The top floor of this building?

A. The top floor of this building.

(Testimony of Hugh L. Ducker)

Q. And when was the hearing held?

A. It was held in July 8th, 1940.

Q. And who was present?

A. J. Everett Blum for the estate.

Q. B-l-u-m?

A. B-l-u-m, and myself for the technical staff.

Q. State just the conversation that took place at that time, if you recall, or just the substance of it, Mr. Ducker.

A. I have refreshed my memory by the written report which I prepared following the conference. The case was [561] presented on two issues; one, whether or not the proceeds of certain insurance policies were includable in the gross estate; and two, whether the corpus of certain trusts was included in the gross estate of the decedent.

Q. Were any facts presented by Mr. Blum or anyone for the taxpayer at that hearing other than what appears in the protest and in the refund claim? By the way, what was the date of the protest that was before you?

A. I think it was 1940.

Mr. Mitchell: Will you stipulate it was 1940?

Mr. Robinson: Yes.

Mr. Mitchell: Very well, that is all right.

Mr. Robinson: I would like to clarify the stipulation. The 1940 protest, with any reference contained therein to the 1937 protest. I do not want to exclude the 1937.

Mr. Mitchell: Very well.

Q. By the way, Mr. Ducker, were the original administrative files before you at the time? A. Yes.

Q. In your possession? A. They were.

Q. I mean the Commissioner's administrative files?

A. They were.

Q. In this case? A. Yes.

(Testimony of Hugh L. Ducker)

Q. They were? [562] A. Yes.

Q. Were any facts presented to you, or data or documents, other than those contained in the administrative files, in the protest, and in the refund claim, by Mr. Blum?

A. I think not. I am trying to recall whether the trust instruments were presented by him. Copies were in the file. I am not sure whether he presented copies of the trust instruments or not.

Q. At that time, did Mr. Blum make any contention to the effect that the property that went into the trusts acquired their separate character by virtue of a partnership, an oral partnership agreement between the spouses?

A. No; he did not.

Q. Did he make the contention or state that the property that went into the trusts, or any of the trusts, was owned separately by the spouses by virtue of the fact that some of it—I am referring to the real estate—was, prior to the time that it was transferred to the trust, owned by the spouses as joint tenants?

A. No; he did not make any such presentation.

Q. Did Mr. Blum at that time contend or state that it was the position of the taxpayer that certain income in the hands of the trustees at the time of decedent's death were not includable in the gross estate because they belonged to the beneficiaries?

A. He made no such contention. [563]

Mr. Mitchell: We offer this. I believe it would be repetition to offer this file. I am willing to offer it, but I think that everything here is contained in the administrative file which has finally arrived, your Honor.

Mr. Robinson: May I ask a question on voir dire?

The Court: Proceed.

(Testimony of Hugh L. Ducker)

Q. By Mr. Robinson: Mr. Ducker, all of the documents contained herein are carbon copies, are they not?

A. They are, I think.

Mr. Robinson: I will object to the offer upon the ground it is not the best evidence. The documents contained therein are self-serving declarations, are hearsay of an inadmissible nature; that the documents neither tend to prove nor disprove any of the issues in this case and therefore are outside of the issues of this case.

Mr. Michell: I have not offered it. I suggested to counsel that it might not be necessary in view of the fact that the originals are all in the administrative file which just arrived before the noon hour. I should probably offer it, however.

Counsel has stated his objection and it is offered, not to establish the truth or falsity of any of the facts recited, but to prove merely that the subjects about which I interrogated the witness were not considered by the government in connection with any refund claim filed by the taxpayer—a negative fact which can only be proven by [564] government agents and official government records.

The Court: Mr. Mitchell, what can be added there? What can be put in evidence in contradiction to the witness' statement that the matters you have inquired into were not considered?

Mr. Mitchell: I don't know what counsel might have, your Honor. The purpose is precisely the same as Exhibit D, which your Honor admitted this morning. The internal revenue agent's official records and file—

The Court: But there is no possible testimony that can refute what the witness has stated; and it seems to me we are just adding exhibits to the record that are not

(Testimony of Hugh L. Ducker)

going to mean anything. Nothing can refute his statement that I can see.

Mr. Mitchell: There are copies of the witness' report and, I presume, as I thought it in the beginning, that the originals of these are all in the administrative file and I think that it is not necessary for it to go in, but I think I should offer it.

The Court: I will sustain the objection.

Mr. Mitchell: I will ask that it be marked for identification.

The Court: All right.

The Clerk: That will be Defendant's Exhibit E, for identification.

(Thereupon, the document referred to was marked Defendant's Exhibit E, for identification.) [565]

[Note: Defendants' Exhibit E is transmitted in its original form to the Appellate Court.]

Q. By Mr. Mitchell: I hand you, Mr. Ducker, an envelope purporting to contain the administrative file in this case and ask you whether you recognize it and whether it is the administrative file that was before you at the time?

Mr. Robinson: Mr. Ducker, before you answer the question, I would like to ask a question on voir dire, after he has examined it.

Mr. Mitchell: Surely.

Mr. Robinson: You may examine it first.

The Witness: Do you want me to examine the whole file?

Mr. Mitchell: Yes; the whole thing, not at too great length, however. I think you can probably identify it without reading every document in it.

(Testimony of Hugh L. Ducker)

While the witness is examining the file, if the Court please, I refer to Defendant's Exhibit D, the internal revenue agent's file that was introduced this morning, and will ask that the Court make an order that copies may be substituted and the original withdrawn as soon as possible.

The Court: I thought they were all copies.

Mr. Mitchell: This is in that original exhibit in evidence.

The Court: Yes; but I thought they were all copies.

Mr. Mitchell: Yes, your Honor; but the internal revenue agent would like to have this file back for its records, and my request was that an order be made that photostatic copies of this Exhibit D be substituted for the [566] original exhibit at some time in the near future.

The Court: So ordered.

* * * * *

Q. By Mr. Robinson: You have not at any time been in the Commissioner's office in Washington, have you?

A. In the Commissioner's office?

Q. Employed in the Commissioner's office in Washington? A. Not in the Commissioner's office.

Q. Your answer is no, that you have not been?

A. No.

Q. You have never been connected with the filing department of the Commissioner's office in Washington, have you? A. I have not.

Q. You don't know whether all of the documents in the possession of the Commissioner are included in this file, or not, do you? A. I do not.

Mr. Robinson: That is all.

The Witness: May I have the question on this file, [567] please?

(Testimony of Hugh L. Ducker)

(Question read by the reporter as follows:

"I hand you, Mr. Ducker, an envelope purporting to contain the administrative file in this case and ask you whether you recognize it and whether it is the administrative file that was before you at the time?")

A. Yes; I recognize it and, as far as I can recall, it is the file that was before me when I considered the case, with the possible exception of one document which I don't—

Q. By Mr. Mitchell: Which you do not recognize?

A. I do not recognize that document at all.

Mr. Mitchell: The witness refers to the document written in longhand containing two sheets of papers, one is a very small sheet, about 3 inches by 4 inches, the other is a letter-size sheet, both on white paper. The small one contains apparently a note addressed to Mr. Melcher, without any signature, dated October 3, 1940, and with a memorandum at the bottom, "Ferry 6 Cal. 7738", and the larger sheet bearing a title at the top "Ferry-6 Cal-7738", and reading: "I agree with Mr. Christie 100% but what can we do?" dated October 3, 1940, initials "HKM" before the date October 7, 1940.

Now, if the Court please, as your Honor can see, this is a tremendous file and I dare say that only a fourth or less of it is material on the points which I am offering into evidence. May I suggest that the envelope be marked for [568] identification and that the portions of the file which counsel for plaintiff desires introduced into evidence, and the portion which the defendant desires introduced into evidence be separate, so that it will be unnecessary to make photostatic copies of probably 150 different documents?

The Court: So understood.

(Testimony of Hugh L. Ducker)

* * * * *

Mr. Mitchell: I may state for the record that I have attached to this envelope a letter from Samuel O. Clark, Jr., Assistant Attorney General, on a letterhead "Department of Justice, Washington, D. C., June 4, 1943", addressed to "Leo V. Silverstein, Esq., United States Attorney, Los Angeles, California.

"Re: Catherine Ferry, Executrix, vs. Rogan, Collector.

"Sir:" It is a short letter, reading:

"The entire administrative file in this case is enclosed in compliance with your request by wire of [569] today's date. In the event that any of the papers from the Bureau's administrative file are introduced into evidence, kindly have copies substituted and return the complete file to this office by registered mail."

It is stamped, "Received June 7, 1943, U. S. Attorney, Los Angeles, California." [570]

* * * * *

The Court: It may be marked, Mr. Cross.

(Thereupon, the document referred to was marked Defendant's Exhibit F, and received in evidence.)

[Note: Defendant's Exhibit F will be found in the Book of Exhibits at page 909.]

(Testimony of Hugh L. Ducker)

Cross-Examination

By Mr. Robinson:

Q. Mr. Ducker, I show you a copy of a document dated June 19, 1940, entitled "Report of Hearing." Have you ever seen that document before?

A. Yes; I have.

Q. Who prepared this document?

A. It is signed by N. E. Burkey, internal revenue agent.

Q. Did you give consideration to this report of hearing prior to rendering your decision? A. I did.

Q. Did you give consideration to the following language concerned in this report of hearing:

"If it be proven that a part of the wife's separate [572] funds were used for the payment of these premiums, no benefit could be given the widow as Ferry died after Article 25, Regulations 80 (1934 Edition) was promulgated.

"It is recommended that the claim for refund be denied on the community issue."

Did you give consideration to those matters?

A. What do you mean by "give consideration to"?

Q. In rendering your decision did you take into consideration the fact that Mrs. Ferry had contributed from her separate funds to the payment of these premiums on these insurance policies?

A. I did not have such a fact before me.

Q. Did you have this report? You had this report of hearing before you, though? A. I did.

Q. And you knew that someone had given consideration to her separate contributions to the insurance policies. is that right?

A. No; I didn't know such a thing.

(Testimony of Hugh L. Ducker)

Q. What does that language mean?

A. It says, "If it be proven". This is the opinion—

Q. In other words—

Mr. Mitchell: Let him finish his answer.

The Witness: May I finish, please?

This report, apparently written by Mr. Burkey, says [573] that it is his opinion "If it be proven that a part of the wife's separate funds were used for the payment of these premiums no benefit could be given the widow as Ferry died after Article 25, Regulations 80 was promulgated.

"It is recommended that the claim for refund be denied on the community issue." [574]

* * * * *

Q. Let us assume that the Commissioner rules that he will not acquiesce in a certain case; are you limited by that non-acquiescence? A. In the same case?

Q. On cases of similar facts?

A. No. No; we can make a recommendation, we can reach our own conclusions on the facts before us and the best law that we can determine at the time.

Q. Do you know at the time you conducted this hearing whether or not you had acquiesced in the case of Lang vs. Commissioner?

A. I remember the case was considered. I am not sure whether it had been acquiesced in or not at that time.

Q. Did you acquiesce at that time in the case of McCoy vs. Commissioner?

A. That case was also discussed. I can tell you by reading the legal set-up here, I think. No; it does not state whether it had been acquiesced in.

(Testimony of Hugh L. Ducker)

Mr. Mitchell: I little louder, please.

A. It does not state whether the two cases had been acquiesced in at the time I considered this.

Q. By Mr. Robinson: You don't know whether you had or not, then?

A. No; I couldn't state. [575]

* * * * *

HELEN MAY OLSON,

called as a witness by and on behalf of the Defendant, after being first duly sworn, was examined and testified as follows:

The Clerk: Your full name?

A. Helen May Olson.

The Clerk: Miss, or Mrs.? A. Mrs.

Direct Examination

By Mr. Mitchell:

Q. Mrs. Olson, what is your occupation?

A. Deputy collector, accounts division, internal revenue collector's office.

Q. In Los Angeles, California? A. Yes.

Q. On what floor of this building is your office?

A. On the tenth.

Q. The tenth floor. Did you, at my request—and, by the way, does the collector's office keep a record of income tax returns filed by taxpayers?

A. Yes; it does. [576]

Q. How far back do those records go?

A. Well, I think we have 1917 yet.

Q. From then down to the present time?

A. Yes; that is, card records on 1917. I think before that they have been destroyed.

(Testimony of Helen May Olson)

Q. Did you at my request make a search of those records to discover whether you had a record of any income, separate or individual income tax returns having been filed by Mrs. Catherine B. Ferry, or Mrs. Peter L. Ferry for the years prior to 1928?

A. Yes; I did. I searched the records, 1919 and 1924 to 1927, inclusive.

Q. That would be 1919, 1924, 1925, 1926 and 1927?

A. That is right.

Q. And did you find that you had any record of her having ever filed a separate or individual income tax return?

A. No; I didn't.

Mr. Mitchell: That is all.

Mr. Robinson: Just a moment.

Cross-Examination

By Mr. Robinson:

Q. Did you find whether or not she filed a joint return with her husband or any other person?

A. No. It was impossible to determine whether the returns filed by the husband were joint returns or not. Her name did not appear on the record. [577]

Q. They might have all been joint returns; isn't that right?

A. I hardly think so, or her name would have appeared with his, Peter L. Ferry and Catherine Ferry.

Q. Isn't it a fact, though, that on the early returns only one name appeared, but the notation was made down under the name: "Is this a joint return?" which was answered yes or no.

A. I did not see the returns themselves, only the card record.

(Testimony of Helen May Olson)

Q. You don't know whether during those years that Mrs. Ferry filed joint returns, or not, then, is that right?

A. No; I do not.

Mr. Robinson: That is all.

Mr. Mitchell: Excuse me.

Re-Direct Examination

By Mr. Mitchell:

Q. Did you find that any returns were filed for those years in any name of "Ferry"; and if so, what name?

A. I found "Peter L. Ferry".

Q. Prior to 1928?

A. The individual tax returns for those years, 1919, 1924, '25, '26 and '27 only had the name of Peter L. Ferry.

Q. I see. A. On the card record.

Mr. Mitchell: All right. [578]

Mr. Robinson: Mr. Mitchell, at this time I would like to make demand on you to produce the returns for the years 1919 to 1927 filed by Peter L. Ferry, being joint returns of Mr. and Mrs. Ferry.

Mr. Mitchell: Of what years?

Mr. Robinson: 1919 to 1927, both inclusive.

The Court: Do you have copies of those which are the originals in your office?

A. We only have a card index record. These all appear, excepting perhaps the 1919 return of Peter L. Ferry, the returns which would be in Washington, 1040.

Q. You only keep a card record and forward the original to Washington, don't you?

A. We forward the return to Washington. Of course, there are returns we keep in the collector's office,

(Testimony of Helen May Olson)

but we would not have any of the old. They have been destroyed long ago.

Q. When you say "destroyed long ago", how long do you keep them?

A. Well, now, I don't know just how long they keep them now, but they have had orders, from time to time, to destroy certain returns.

Q. So you do not know what returns you would have, then?

A. We would not have anything, I don't think, prior to 1936, perhaps. I am not sure. I would have to find out.

Q. But you would not have even those originals; they [579] would be in Washington, wouldn't they?

A. We would only have originals on 1040-A's, the returns that would be handled in the collector's office, audited there. Incomes over \$5,000, most of them have gone to Washington, excepting for this last year.

The Court: Yes. You may inquire.

* * * * *

The Court: Counsel, with reference to the request to the Government, you must have copies, haven't you, of those returns?

Mr. Mitchell: I am going to introduce—oh, excuse me, your Honor.

The Court: Haven't you copies of those?

Mr. Robinson: I have a copy for the year 1919, I believe, and the one for the year 1924, I believe.

The Court: Show those to counsel and that may obviate the request.

Mr. Robinson: I do not have those with me.

(Testimony of Helen May Olson)

Mr. Mitchell: I intended to introduce what I had, your Honor. I thought counsel had read this and he had not asked for those before.

The Court: No. All right.

Mr. Mitchell: And that the plaintiff's case was rested.

The Court: It has in the main, but I assume there will be rebuttal. [580]

Mr. Mitchell: I have no objection to any returns that he might like to introduce.

Mr. Robinson: I do not have them with me, counsel.

Mr. Mitchell: Mr. Martell.

CHARLES S. MARTELL,

called as a witness by and on behalf of the Defendant, having been previously duly sworn, was examined and testified as follows:

The Court: I was rather assuming, Mr. Mitchell, that where you had opened up the question now of different returns and different years and what they showed, in rebuttal, counsel might have a right to introduce the returns under that theory.

Mr. Mitchell: Oh, yes, your Honor.

The Court: Yes?

Mr. Mitchell: Yes, if the Court please.

The Court: All right.

Direct Examination

By Mr. Mitchell:

Q. Mr. Martell, what is your occupation?

A. Trust auditor in the Title Insurance and Trust Company.

Q. Did the Title Insurance and Trust Company—

(Testimony of Charles S. Martell)

Mr. Robinson: I will stipulate that they are successors to Title Guarantee and Trust Company, if that is what you are going to bring out. [581]

Mr. Mitchell: Yes.

Q. When was the Title Guarantee and Trust Company consolidated with the Title Insurance and Trust Company?

A. December 19, 1942.

Q. And have you brought with you the records of distributions in respect of Trust No. 1052 of the Title Guarantee? A. Yes.

Q. I will ask you whether your records indicate to whom the distributions were made?

A. They were made to Peter L. Ferry.

The Court: What trust number is that?

A. 1052.

Q. By Mr. Mitchell: You mean by that, that the checks evidencing the distribution were made payable to Mr. Ferry? A. Yes.

Q. Were they mailed to him? A. Yes.

Q. I call your attention to Plaintiff's Exhibit entitled "Distributions of Income from Trust 1052." Never mind. I will ask you whether that practice was carried on until Mr. Ferry's death? A. Yes; it was.

The Court: We had an exhibit, didn't we, on that distribution?

Mr. Mitchell: Yes, your Honor. [582]

Mr. Robinson: It was put in for identification only.

The Court: What was the number of it?

Mr. Mitchell: Exhibit 3 for identification. I withdraw my objection to this exhibit at this time.

The Court: All right.

Mr. Mitchell: If counsel cares to offer it again.

Mr. Robinson: I still offer it.

(Testimony of Charles S. Martell)

The Court: All right; in evidence.

The Clerk: That will be Plaintiff's Exhibit 3, into evidence.

(Thereupon, the document referred to, heretofore marked Plaintiff's Exhibit 3 for identification, was received in evidence.)

[Note: Plaintiff's Exhibit 3 will be found in the Book of Exhibits at page 623.]

The Court: Let me see Exhibit 3 again so I can keep these exhibits in my mind.

Q. By Mr. Mitchell: Mr. Martell, there were two life beneficiaries in this trust, No. 1052. Can you explain how you happened to make the checks payable to Mrs. Ferry in the first place?

A. I think it was probably through error, because it was later corrected.

Q. You refer to this Exhibit 3 as the correction?

A. Yes.

Q. But after this exhibit—this exhibit is dated November 16, 1934—and after the receipt of this letter from Mr. and Mrs. Ferry, you continued to make the checks [583] payable to Mr. Ferry only? A. Yes.

Mr. Mitchell: Without waiving the Government's objection to evidence concerning income on hand in this Trust 1052 at the time of death being excludable on the ground that it belonged to the beneficiaries, not knowing whether the Court will consider that ground of recovery.

I will ask the witness whether, had the trust been revoked by Mr. Ferry and others in conjunction with him

(Testimony of Charles S. Martell)

prior to his death, immediately prior to his death, would you have distributed that income to the beneficiaries?

Mr. Robinson: I am going to object to it as incompetent, irrelevant and immaterial, outside of the scope of the issues in this case what he would have done. What actually happened and the facts the witness can testify to.

The Court: I think, counsel, you have to stay by what the record shows, not what he would have done under different circumstances.

Mr. Mitchell: Then, I will ask him the practice.

Q. How long have you been a trust officer, Mr. Martell?

A. I have been with the company since 1926.

Q. About 17 years. By whom were you employed during those years?

A. Title Guarantee and Trust.

Q. Where a revokable trust at the death of one of the beneficiaries contains income and is revoked just before [584] the death of the donor or donors do you still distribute that income to the beneficiaries named in the trust?

Mr. Robinson: I object to the question as incompetent, irrelevant and immaterial, outside of the issues in this case, calling for a conclusion of an expert without a foundation having been laid.

Mr. Mitchell: Stipulate that it is outside of the issues in the case. I have not waived our objection to the evidence introduced by the plaintiff on that issue, but without waiving that objection, the question is asked in view of the fact that it cannot be determined at this time whether, in its final decision, the Court will decide that it is an issue. Counsel for plaintiff contends that it is an issue, and counsel for defendant contends that it is not an issue.

(Testimony of Charles S. Martell)

The Court: The point that is in my mind, counsel, is: Are we concerned with what the practice is, or what he generally did? The question is merely what was done in this case. For instance—and this exhibit 3 is a very good illustration of what I have in mind—if you would ask this witness, where a trust is created and the accumulations of the trust are made payable to certain beneficiaries monthly, what is your practice, and he would say, I assume, to pay the beneficiaries named in the trust; and then counsel would hand him this trust and say, “But here, you went on for years ignoring the beneficiaries and you paid to one party.” Then the answer [585] is, as he just stated, it was an error that he had corrected by this exhibit. So it is not what they generally do. It is what was done, I think, in this case; and I think that Exhibit 3 illustrates it. The practice is, I would say, to pay beneficiaries monthly as required by the trust; and then you present to him Exhibit 3 and say, “But, you did not do it in this case.” Well, that was an exception.

Mr. Mitchell: Perhaps I can make the matter clear, your Honor. This particular trust is a revocable trust, is it not, Mr. Robinson?

Mr. Robinson: I believe that the trustors have the right to alter and amend—I don’t recall—or right to revoke.

Mr. Mitchell: And change beneficiaries. I will change the question. Instead of saying “revoke”, “a revocable trust”, I will say the trustors change the beneficiary to themselves, instead of to someone else—

The Witness: I don’t get the question, Mr. Mitchell.

The Court: He has not finished yet.

Q. By Mr. Mitchell: —what is the practice of the trust officers in the case of trusts that are amendable and

(Testimony of Charles S. Martell)

trusts where the beneficiaries can be changed in respect of the distribution of income after the beneficiaries have been changed?

Mr. Robinson: I object to the question as assuming facts not in evidence in this matter. [586]

The Court: I don't think it matters one way or the other. I will permit the witness to answer. I assume that they are going to pay the beneficiaries which they are instructed to do. I think that the trust company would be liable if they did not. What is the answer?

A. To pay the beneficiaries whatever they are entitled to.

Q. By Mr. Mitchell: The new beneficiaries?

A. Correct.

The Court: You would have some suits on your hands if you did not.

Mr. Mitchell: I did not hear the Court.

The Court: I said he would have some suits on his hands if he didn't.

Q. By Mr. Mitchell: Had it been determined by the bank how much of the sum of \$1,749.06 would be used by the bank to reimburse it for its compensation for services under the trust? A. To date of death?

Q. Yes. Had it been determined at the time, on June 16, 1935? A. I don't recall.

Q. Now, turning to Trust No. 1080, also with the Title Guarantee and Trust Company—an exhibit which has been introduced by the plaintiff and I am sorry I don't know the number of it—but it refers to the distribution of [587] income of Trust 1080 of Title Guarantee and Trust Company and does not indicate to whom the income was distributed. I have a carbon copy handed to

(Testimony of Charles S. Martell)

me by plaintiff's counsel, and this exhibit reads: "Mar. 4, 1931, \$722.93" was distributed.

The Court: 1931?

Mr. Mitchell: Yes, your Honor.

The Court: All right.

Q. By Mr. Mitchell: (Continuing) "Nov. 4, 1931 \$180" distributed; "Nov. 23, 1931 \$260" distributed. I will ask you whether your records show that on November 23, 1931, \$260 was distributed to anyone?

A. Yes.

Q. Do you recall these amounts? Will you check them? I have before me the copy of plaintiff's exhibit No. 42.

A. They are correct.

Q. A total of \$2,218.38?

A. That is right.

Q. Do your records indicate to whom the checks were payable? By the way, that is the amount that was distributed insofar as concerned the one-tenth beneficial interest owned by the two spouses as joint tenants, is that correct?

A. Yes.

Q. To whom were those amounts distributed?

Mr. Robinson: I will object to these. The trust [588] instruments speak for themselves as to who it was distributed to. If you want to limit it to whom it was payable?

Mr. Mitchell: Does the trust instrument itself indicate to whom this distribution was made?

Mr. Robinson: The assignment, I believe, does.

(Testimony of Charles S. Martell)

Mr. Mitchell: Have you that exhibit, Mr. Clerk?

The Court: Exhibit No. 42.

Mr. Mitchell: That is the Trust 1080?

The Court: 1080, \$2,218.38.

Mr. Mitchell: That is it, that is the exhibit.

Q. Were you looking at the declaration of trust to determine to whom this was distributed, Mr. Martell?

A. Yes.

Q. Does the declaration of trust contain the item \$2,218.38? A. No.

Q. Then, what do you look to to get those amounts and the dates?

A. Not the amount distributed. I was looking here for the beneficial interest.

Q. Oh, I see. All right. State whose particular beneficial interest this covers?

A. It was one-tenth interest in the trust and was one-tenth interest belonging to Peter L. Ferry and Catherine B. Ferry.

Q. All right. Now I ask to whom were these amounts [589] set forth which you have just given there?

Mr. Robinson: I will stipulate the checks were payable to Mr. Ferry.

Mr. Mitchell: All right.

Q. Were the checks mailed to Mr. Ferry?

A. Yes.

* * * * *

HARRY O. MILLER,

called as a witness by and on behalf of the defendant, being first duly sworn, was examined and testified as follows:

The Clerk: Your full name, Mr. Miller?

A. Harry O. Miller.

Direct Examination

By Mr. Mitchell:

Q. Mr. Miller, did you bring with you your records in Trust No. 6204 of the Citizens Bank?

A. Yes, sir.

Q. By the way, Mr. Miller, what is your occupation and with whom are you associated?

A. I am assistant trust officer with the Citizens National Trust & Savings Bank of Los Angeles.

Q. I will ask you whether the trustee bank collected [590] the income from the properties contained in Trust No. 6204? A. No, sir.

Q. If it did not, who collected the income. if you know? A. I don't know.

Q. At the inception of this trust was any part of the Ferry Fresno ranch part of the corpus; and if so, what portion?

A. Yes; part of it was, Sections 1, 11 and 14.

Q. They were a part of the corpus at the inception of the trust?

A. Yes, sir. I wish to make a correction. That is 15. 1, 11 and 15.

The Court: Sections? A. Sections.

Q. By Mr. Mitchell: In reference to Trust 2012 did you bring your files in that trust, also?

A. Yes, sir.

(Testimony of Harry O. Miller)

Q. Citizens Trust & Savings Bank is trustee in that trust, also? A. Yes, sir.

The Court: Exhibit 63 (41).

Mr. Mitchell: Trust No. 2012.

The Court: Exhibit 41.

Mr. Mitchell: 41. Thank you, your Honor. That is helpful.

The Court: \$11,475.86.

Mr. Mitchell: That is right. [591]

Q. I call your attention to Plaintiff's Exhibit 41, which sets forth distributions of income made by you in connection with this trust between August 9, 1925, and June 16, 1935. I will ask you how the checks were made payable that are contained in that Plaintiff's Exhibit 41?

A. They were made payable to Peter L. Ferry and Catherine B. Ferry.

Q. To whom were they mailed? Were they mailed or delivered personally?

A. No; they were mailed; I think the mailings in practically all instances were to Peter L. Ferry.

Q. How were the checks endorsed, I mean by the payee? A. I am unable to state that.

Q. You could only ascertain that by examining the checks, the cancelled checks? A. Yes, sir.

Q. Have you those cancelled checks? The bank still has them? A. I believe so.

Q. How were the distributions made to the six children?

A. To the children that were of age, the checks were made payable to those individually; to the children who were minors, the checks were made payable to Mr. and Mrs. Ferry, as guardians, that is, Peter L. Ferry and Catherine B. Ferry, as guardians.

(Testimony of Harry O. Miller)

Q. Does this list, Plaintiff's Exhibit 41, include the income that went to the children? [592]

A. No, sir.

Q. It does not? A. It does not.

Q. Those were separate checks, were they?

A. Yes, sir.

* * * * *

Q. By Mr. Mitchell: I call your attention to Page 1 of the declaration of trust—

The Court: This is in 2012?

Mr. Mitchell: 2012, Exhibit H attached to the stipulation of facts, Page 60 of the stipulation of facts.

Q. Have you the declaration of trust before you, Mr. Miller? A. Yes, sir.

Q. There is set forth on Page 1 of the declaration of trust a number of items of properties that were transferred to the Citizens Bank, as trustee. The first item: "Cash \$48,907.12". Do you know in what form the bank received that cash? A. No. I am unable to say.

Q. Whether by check or by cash? [593]

A. I do not know.

Q. Then, the next item is "1 note executed by A. L. Baird and H. G. McBain, dated 11-1-24 at 6 months \$2,220." Do you recall that note?

A. Only that the note was received in the trust.

Q. The note has been long since paid, I presume?

A. Yes.

Q. Do you know to whom it was payable?

A. It was paid to the trustee.

Q. Do you remember to whom the note was originally payable? A. No.

(Testimony of Harry O. Miller)

Q. The next item is a note executed by the same promissors, dated December 1, 1924, in the same amount. Do you recall to whom that note was originally payable?

A. No, sir.

Q. Do you remember to whom the rest of the notes were originally payable that are listed there?

A. No, sir.

Mr. Mitchell: I think that is all.

Mr. Robinson: No questions.

Mr. Mitchell: Now, Mr. Parke.

The Court: Counsel, have you any objection if I write on Exhibit 42 that the checks representing the amount of \$2,218.38 were payable to Peter L. Ferry?

Mr. Robinson: No; I have no objection to it. [594]

Mr. Mitchell: None, none whatever, your Honor.

WALTER E. PARKE,

called as a witness by and on behalf of the Defendant, being first duly sworn, was examined and testified as follows:

The Clerk: Your full name?

A. Walter E. Parke, P-a-r-k-e.

Direct Examination

By Mr. Mitchell:

Q. Mr. Parke, what is your occupation?

A. I am an employee of the auditing department, Citizens National Trust and Savings Bank.

Q. Are you familiar with the acquisition by Mr. Ferry or Mr. Ferry and wife, of Sections 1, 11 and 15 that Mr. Miller just referred to, being a part of the Fresno ranch property contained in Trust No. 6204?

A. Yes.

(Testimony of Walter E. Parke)

Q. Can you state the circumstances under which Mr. Ferry acquired that property? [595]

* * * * *

The Court: Well, just a moment, Mr. Mitchell. You can answer this question yes or no, Mr. Parke. Do you know the circumstances by which Mr. Ferry acquired the property? A. Yes.

Q. You were part of that transaction, you handled it?

A. I handled the accounting entries, your Honor.

Q. The accounting entries? A. Yes.

Q. At the time of the purchase?

A. At the time of the purchase. [597]

* * * * *

A. At the time the property was acquired by Mr. Ferry it had been held by the bank in other real estate, having been acquired by the bank some time previously.

Q. It formally, then, belonged to the bank?

A. It belonged to the bank in satisfaction of a debt previously contracted.

Q. By someone a third party?

A. Other than Mr. Ferry; yes. There were certain lands held in trust for Mr. W. S. Sparr, subdivision trusts.

Q. By the Citizens National Bank?

A. By the Citizens Bank, held in trust, against which the Citizens Bank had liens for money advanced, and also against which Mr. Peter L. Ferry had liens for money advanced.

Q. Are you familiar with the times that those liens arose, the approximate years?

A. Only as they came before my notice at the time of the transaction.

(Testimony of Walter E. Parke)

Q. Can you state the times that they came to your notice?

A. The liens arose in the years 1925, 1926 and 1927.

Q. That is, Mr. Ferry's liens? A. Yes.

Q. Were they mechanic's liens? [598]

A. No. They were liens against beneficial interests in the trust created by assignment.

Q. Oh, I see. All right.

A. At the time that Mr. Ferry acquired this land, the land referred to as near Fresno, early in 1930—

Q. Let us give you the correct description of that land. The sections I refer to are Sections 1, 11 and 15, Township 18 South, Range 17 East, M. D. B. and M., Fresno County, is that correct?

A. That is correct.

Mr. Mitchell: I might state for the court's information that that is a part of Parcel 35 of Trust 6204.

The Court: Yes.

Mr. Mitchell: All right.

A. In order, then, to clear up the Sparr indebtedness on a working out of his loans, Mr. Ferry was deeded the three sections of land in joint tenancy with his wife in exchange for the surrender or reassignment to the bank of the assignments of the beneficial interests in these trusts of Sparr which Mr. Ferry held. [599]

* * * * *

Q. By Mr. Mitchell: Mr. Parke, do you know how Mr. Sparr happened to assign some of his beneficial interest to Mr. Ferry? Was that the Sparr Heights Tract that you refer to?

A. Sparr Heights Tract and the Oakmount Country Club Estates. With respect to the Oakmount Country Club Estates, I understand that the assignment was for

(Testimony of Walter E. Parke)

work performed in the installation of public utilities and streets.

* * * * *

Mr. Mitchell: There was some reference during the [602] examination of the last witness to an exhibit numbered 63. Will counsel stipulate that that is Exhibit 41?

Mr. Robinson: If that is a fact, counsel, I will so stipulate.

Mr. Mitchell: All right; that the reporter can so call it in his notes.

Mr. Robinson: Counsel, you made reference to the fact that the income from one of the trusts had not been introduced into evidence. To my recollection, they were all introduced. Which item was that?

Mr. Mitchell: 1052.

Mr. Robinson: That is Citizens National Bank?

Mr. Mitchell: No; Title Guarantee and Trust Company, Trust 1052.

The Court: Mr. Miller testified that the payments in Exhibit 41—I see the error was caused by “6/3” is written in here, but that is the date.

Mr. Miller: Yes, sir.

The Court: Is it Exhibit 41 that the checks were payable to Peter L. Ferry and Catherine B. Ferry and to each of the children who were above age, and those who were minors, the checks were paid to the guardians?

Mr. Mitchell: Yes, your Honor. I just wanted to correct the amount.

The Court: Any objection to writing that on the exhibit? [603]

Mr. Mitchell: Oh, no, your Honor.

(Testimony of Walter E. Parke)

Mr. Robinson: No objection.

The Court: All right. It just helps out in going over these cases.

Mr. Mitchell: We offer into evidence certificate of Deputy Commissioner D. S. Bliss, certifying "that after diligent search, no record is found to exist in the records of" the Commissioner's office "of a gift tax return, or returns, filed by Peter Ferry, now deceased, reporting a gift, or gifts, to his wife for the calendar years 1924 and 1925."

I might say that during those years there was a gift tax act in effect. [604]

* * * * *

The Clerk: That will be Defendant's Exhibit G into evidence.

(The document referred to was marked Defendant's Exhibit G, and was received in evidence.)

[Note: Defendant's Exhibit G will be found in the Book of Exhibits at page 1010.]

Mr. Mitchell: I will now offer certified copy of [605] individual income tax return of Peter L. Ferry for the year 1924 as defendant's next exhibit in order.

The Clerk: Defendant's Exhibit H into evidence.

(The document referred to was marked Defendant's Exhibit H, and was received in evidence.)

[Note: Defendant's Exhibit H will be found in the Book of Exhibits at page 1011.]

(Testimony of Walter E. Parke)

Mr. Mitchell: We also offer into evidence a certified copy of an individual income tax return of Peter L. Ferry for the taxable year 1926.

The Clerk: This exhibit will be I into evidence.

(The document referred to was marked Defendant's Exhibit I, and was received in evidence.)

[Note: Defendant's Exhibit I will be found in the Book of Exhibits at page 1013.]

The Court: Proceed.

Mr. Mitchell: We also offer into evidence the individual income tax return of Peter L. Ferry for the year 1927.

The Clerk: That is Defendant's Exhibit J into evidence.

(The document referred to was marked Defendant's Exhibit J, and was received in evidence.)

[Note: Defendant's Exhibit J will be found in the Book of Exhibits at page 1015.]

Mr. Mitchell: I might state that counsel for plaintiff has already introduced the two returns for the spouses for the taxable year 1928.

The Clerk: This exhibit will be K into evidence (referring to certified copy of individual income tax return of Peter L. Ferry for the taxable year 1929).

(The document referred to was marked Defendant's Exhibit K, and was received in evidence.) [606]

[Note: Defendant's Exhibit K will be found in the Book of Exhibits at page 1017.]

(Testimony of Walter E. Parke)

Mr. Mitchell: We also offer into evidence the original individual income tax return of Mrs. Peter L. Ferry for the taxable year 1929.

The Clerk: That will be Defendant's Exhibit L into evidence.

(The document referred to was marked Defendant's Exhibit L, and was received in evidence.)

[Note: Defendant's Exhibit L will be found in the Book of Exhibits at page 1019.]

Mr. Mitchell: We now offer into evidence certified copy of the individual income tax return of Peter L. Ferry for the taxable year 1930.

The Clerk: That is Defendant's Exhibit M into evidence.

(The document referred to was marked Defendant's Exhibit M, and was received in evidence.)

[Note: Defendant's Exhibit M will be found in the Book of Exhibits at page 1021.]

Mr. Mitchell: And the original income tax return of Mrs. Peter L. Ferry for the same year, 1930.

The Clerk: Defendant's Exhibit N into evidence.

(The document referred to was marked Defendant's Exhibit N, and was received in evidence.)

[Note: Defendant's Exhibit N will be found in the Book of Exhibits at page 1023.]

Mr. Mitchell: We now offer into evidence the individual income tax return of Peter L. Ferry for the year 1931.

(Testimony of Walter E. Parke)

The Clerk: Defendant's Exhibit O into evidence.

(The document referred to was marked Defendant's Exhibit O, and was received in evidence.)

[Note: Defendant's Exhibit O will be found in the Book of Exhibits at page 1025.]

Mr. Mitchell: And the individual income tax return of Mrs. Peter L. Ferry for the year 1931.

The Clerk: Defendant's Exhibit P into evidence.
[607]

(The document referred to was marked Defendant's Exhibit P, and was received in evidence.)

[Note: Defendant's Exhibit P will be found in the Book of Exhibits at page 1027.]

Mr. Mitchell: And we offer into evidence the individual income tax return of Peter L. Ferry for the year 1932.

The Clerk: Defendant's Exhibit Q into evidence.

(The document referred to was marked Defendant's Exhibit Q, and was received in evidence.)

[Note: Defendant's Exhibit Q will be found in the Book of Exhibits at page 1029.]

Mr. Mitchell: These are originals unless otherwise stated.

And the individual income tax return of Mrs. Peter L. Ferry for the year 1932.

(Testimony of Walter E. Parke)

The Clerk: Defendant's Exhibit R into evidence.

(The document referred to was marked Defendant's Exhibit R, and was received in evidence.)

[Note: Defendant's Exhibit R will be found in the Book of Exhibits at page 1031.]

Mr. Mitchell: And the individual income tax return of Peter L. Ferry for the year 1933.

The Clerk: Defendant's Exhibit S into evidence.

(The document referred to was marked Defendant's Exhibit S, and was received in evidence.)

[Note: Defendant's Exhibit S will be found in the Book of Exhibits at page 1033.]

Mr. Mitchell: And the individual income tax return of Mrs. Peter L. Ferry for the year 1933.

The Clerk: Defendant's Exhibit T into evidence.

(The document referred to was marked Defendant's Exhibit T, and was received in evidence.)

[Note: Defendant's Exhibit T will be found in the Book of Exhibits at page 1035.]

Mr. Mitchell: Mrs. Ferry, will you take the stand now, please? [608]

CATHERINE B. FERRY,

the plaintiff herein, called as a witness by and on behalf of the defendant, having been previously duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Mitchell:

Q. Mrs. Ferry, referring to the property that was contained and was a part of Trust No. 6204, the Citizens Bank Trust, do you recall those properties?

A. You mean the ranch? You mean the ranch property?

Q. Yes; the ranch and 37 other pieces.

The Court: Mrs. Ferry is called as your witness, counsel?

Mr. Mitchell: Under Rule 43(b).

A. Well, I don't just understand. You mean that I remember every piece of property?

Q. By Mr. Mitchell: I am going to ask you who managed those properties?

A. Well, Mr. Ferry always managed them.

Q. He did the managing himself?

A. Yes; he did.

Q. And you did not take part in that, I guess?

A. Oh, I may have collected rents.

Q. You may have collected some rents?

A. Yes.

Q. No rents were collected from the ranch, I presume?

[609] A. No.

Q. Mr. Ferry handled that himself?

A. I did not collect any.

(Testimony of Catherine B. Ferry)

Q. Did Mr. Ferry account to you for any portion of the income that he received from these properties in Trust 6204?

A. Well, it all went in for deposit, was all.

Q. Into what? A. Into the bank account.

Q. Which bank account?

A. You mean the rents and things that were received?

Q. Any income from the properties contained in Trust 6204.

A. Well, I wouldn't know which bank account, but whatever one, I would think, that we were dealing with at the time.

Q. You did not go with him to the bank to make the deposits or the banks, I presume?

A. Oh, not every time; no.

Q. And he had a ranch account up at Hanford, I believe, didn't he? A. Yes; he did have one.

Q. You took no part in Mr. Ferry's business in Crafton, Pennsylvania, did you? A. No, I didn't.

Mr. Mitchell: May I see, Mr. Clerk, the exhibits that [610] were introduced into evidence consisting of bundles of checks?

Q. I call your attention, Mrs. Ferry, to Plaintiff's Exhibit 48.

Was this introduced for identification?

The Clerk: No. They are in evidence, Mr. Mitchell.

Mr. Mitchell: It is marked "identification."

The Clerk: They are all in evidence. Yes; they are all in evidence.

(Testimony of Catherine B. Ferry)

Mr. Mitchell: Without waiving the objections made to the introduction of these exhibits, I will ask the following questions:

Q. Mrs. Ferry, I call your attention to the first check in this bundle of checks, Exhibit No. 48, signed "Peter L. Ferry by Katherine Ferry." Do you spell your name with a "K"? A. No; I don't.

Q. Is that your signature?

A. No. That is Mr. Ferry's sister's signature.

Q. Oh, I see. Did Mr. Ferry's sister have power and the right to draw on this account on the American National Bank in March, 1927?

A. Well, that was in reference to the business.

Q. This is payable to an insurance company.

A. Yes.

Q. It is a premium, presumably it was payment of a [611] premium upon an insurance policy.

A. Well, she was keeping books for him, I think, at the time.

Q. That is also true of the check dated March 22, 1928?

A. Well, that would be true of any that is "by".

Q. "by Katherine," spelled "K-a-t-h"? A. Yes.

Q. Is that also true in respect of Plaintiff's Exhibit 50, all checks signed "Peter L. Ferry by Katherine Ferry", spelled "K-a-t-h"? A. Yes.

Q. Is that also true in respect of Plaintiff's Exhibit 51, a check signed "Peter L. Ferry by Katherine Ferry", spelled "K-a-t-h"? A. Yes; it is.

Q. I now call your attention to Plaintiff's Exhibit 52, check numbered 1364, dated October 8, 1929, "Payable to the Order of Metropolitan Life Ins. Co." and

(Testimony of Catherine B. Ferry)

signed "Haines Canyon Rock Co., Incorporated by Peter L. Ferry" and ask you what was the Haines Canyon Rock Co., Incorporated?

A. Well, it was just a rock plant.

Q. Who operated that business?

A. Well, I couldn't tell you.

Q. Was it a quarry, a rock quarry?

A. Yes. [612]

Q. It appears to have been a corporation. "Incorporated" is a part of the signature.

A. What date is that?

Q. October, 1929.

A. Of course, I didn't know much about it then, see. I didn't do much of the bookkeeping after we moved to our present home, or I never did much of that kind of bookkeeping. I mean I wouldn't know anything about it.

Q. You would not know what Mr. Ferry's interest was in the Haines Canyon Rock Company?

A. No; I don't.

Q. I call your attention to Exhibit 54, some more checks signed "Peter L. Ferry by Katherine Ferry." Your answers to the other questions in that regard are the same I presume; she was keeping books for Mr. Ferry at that time? A. Yes.

Q. And that is Mr. Ferry's sister. Mrs. Ferry, your son James testified that Mr. Ferry sold out the equipment, rental equipment business, to him in 1930 or 1931.

Mr. Robinson: I object to the question as assuming a fact not in evidence. There is no evidence that Mr. Ferry sold anything.

Q. By Mr. Mitchell: Well, that your son bought the rental equipment business in 1930 or 1931; do you recall that? A. Yes; from both of us. [613]

(Testimony of Catherine B. Ferry)

Q. Did Mr. Ferry continue to keep his account in the First National Bank in the name of "Peter L. Ferry General Contractor" after your son purchased the business? A. Well, that I couldn't say.

Q. And your answers to the questions regarding Mr. Ferry's sister, Katherine, also apply to Plaintiff's Exhibit 56?

A. Well, any that would be by her as bookkeeper.

Q. And also, to Plaintiff's Exhibit 57?

A. Is it by Katherine?

Q. Yes. A. Yes.

Q. And Plaintiff's Exhibit—

A. I think when we were going on trips that Mr. Ferry always gave her power of attorney or something.

Q. To sign his name by her? A. Yes.

Q. And that applies also to Exhibit 58?

A. Is that by Katherine?

Q. Yes; by Katherine. A. Yes.

Q. Mrs. Ferry, did you look for and find over the week-end your 1930 will?

A. I looked, but, as I told you, I knew I wouldn't find it. But I brought in my present one that says that all former wills are revoked. [614]

Q. I see; all right. Going back to this trip to Fresno, what year was that trip? You testified that you went to Fresno with Mr. Ferry and James.

A. What do you mean? I had so many trips there I wouldn't know what trip.

Q. The one about which you testified.

A. My daughter lives on the ranch so I have made many a trip there.

Q. The one in which Mr. Ferry, you testified, took you up there to the ranch before it was purchased, or a

(Testimony of Catherine B. Ferry)

portion of the ranch before it was purchased. Do you recall your testimony about that?

A. Do you mean the last two sections, or before?

Q. The one about which you testified last week, a trip that you made to Fresno with Mr. Ferry and with James, and about which James also testified while you were in the court room; and you testified that he asked you what you thought of the proposition, whether it should be purchased or not. Do you remember testifying to that?

A. Oh, he always did.

Q. That is the trip that I am asking you now what year it was.

A. Well, I don't know, '32 or '33, I guess.

Q. 1932 or 1933. Did you and he, as joint tenants, already own some property? A. Yes; we did. [615]

Mr. Mitchell: This testimony and inquiry, of course, is without waiver of the Government's defense and objections to plaintiff's testimony along this line.

Q. From whom was he purchasing? Who owned the property at that time that you contemplated buying?

A. You mean at Fresno?

Q. Yes. A. You mean the land?

Q. The property that you went to see on this trip we were just speaking of.

A. Oh, you mean that two new sections?

Q. Yes. A. One name, I think, was Goodrich.

Q. Goodrich. E. J. Goodrich? A. Yes.

Q. What did he want for the property?

A. Well, I couldn't tell you. I don't—

Q. Mr. Ferry did not tell you at the time, I presume?

A. Well, I was with him but I wasn't close.

Q. Did he discuss the terms with you?

A. No; he didn't.

(Testimony of Catherine B. Ferry)

Q. How many acres were there that he was considering buying then?

A. I wouldn't know. It was around a thousand, I imagine. I am not very good at judging acreage.

Q. Are you an authority on values of farm lands?
[616] A. Indeed I am not.

Mr. Mitchell: May I have Exhibit 2, please?

Q. I believe you testified that you knew of three accounts that Mr. Ferry had prior to his death; one was the First National Bank of Glendale; one, you believed, was the American National; and what was the other one?

Mr. Robinson: I object to the question as assuming a fact not in evidence. The witness testified there were four accounts.

Q. By Mr. Mitchell: What were those four accounts, Mrs. Ferry?

A. There was the California Bank and the First National and—

The Court: First National of Glendale?

A. Yes; and, I think, the Citizens. Well, I remember of mentioning some the other day that are out of existence, but that would not be on this account.

Q. By Mr. Mitchell: You did not know about this account—I am calling your attention to Exhibit 2—an account with the Citizens National Trust and Savings Bank of Los Angeles, a commercial account in the name of Peter L. Ferry in which he had a balance on hand at the time of death of \$127.36?

A. Well, I would remember some, but I wouldn't at that time remember.

(Testimony of Catherine B. Ferry)

Q. This was a bank account that you turned over, I [617] presume, to your attorney when he made out this tax return for you?

A. Who made out the tax return?

Q. Your attorney. A. Oh, yes.

Q. I now call your attention to page A-16 of Exhibit 2, the estate tax return, and call your attention under Schedule D-1 to items 1, 2 and 5. Item 1 reads:

“First National Bank of Glendale, commercial account, in name of Peter L. Ferry & Son.”

Did you also know about that account?

A. Yes; I did.

Q. And did you know about—

A. But I didn't know the amount or anything, but I knew of it.

Q. No; I see. Then, item 2:

“First National Bank of Glendale, savings account, in name of Peter L. Ferry Ranch.”

Did you know about that account?

A. Yes; I did.

Q. And item 5. A. Bank of Lemoore.

Q. “First National Bank of Lemoore, commercial account, in name of Peter L. Ferry Ranch”? A. Yes.

Q. You knew about that account? [618]

A. Yes.

Q. But last week you did not remember them at the time counsel asked you the question, I guess?

A. Oh, I see. Yes.

Mr. Mitchell: May I see the stipulation of facts, please, your Honor?

The Court: Surely.

(Testimony of Catherine B. Ferry)

Q. By Mr. Mitchell: I now call your attention to Exhibit 1 in this case, the stipulation of facts, page 55, where there is set forth, in paragraph VIII of Exhibit G of the stipulation of facts, a declaration of trust of the Security-Trust & Savings Bank, Trust No. 5869, where is set forth the dates of birth of your children. Are those dates correctly set forth there? You might just read them over carefully and see if they are correct.

A. Yes; I think they are correct.

Q. And you had another child born, Patrick, after this was executed? A. Yes.

Q. What was his date of birth?

A. It was March the 17th, 1929.

Q. Mrs. Ferry, did any of these children die?

A. Yes; one, Catherine Helen Ferry.

Q. Catherine, the one that was born in 1913; and when did she die? A. In 1931. [619]

Q. Do you remember the date?

A. March the 16th.

Q. Mrs. Ferry, did you have any other children born after you came to California besides these and Patrick?

A. Well, there was one other that died.

Q. How long ago was that?

A. He died in 1924.

Q. '24, I see. I believe—or, did you testify? I don't recall whether I asked you this question: Whether you personally ever got out and earned any money yourself during your marriage?

A. I think you did ask me.

Q. I did. Well, I will skip that. Who was the breadwinner in your family, Mr. Ferry?

A. Yes; he was.

(Testimony of Catherine B. Ferry)

Q. And he provided well for you and the children, did he not? A. Yes; he did.

Q. How long had Mr. Ferry been in the contracting business before you came to California in 1909?

A. I wouldn't know.

Q. Long before— A. Oh, you mean—

Q. In Crafton, Pennsylvania, I mean.

A. Well, I couldn't just say. As long as I was married. [620]

Q. And long before you were married, perhaps?

A. Well, I think he was working for his father then.

Mr. Mitchell: The defendant now moves, if the court please, that all insurance premium checks introduced by plaintiff, including Plaintiff's Exhibits 48 through 58, be stricken on the following grounds:

First, that there is no clear evidence that any of the funds represented by such checks was California community property of the spouses of the type acquired through the toil or talent of either spouse exerted after July 29, 1927.

Second, that even if a portion of the funds represented by such checks was the separate property of plaintiff, they are inadmissible since such ultimate fact is not supported by plaintiff's claim for refund.

And third, that there is no clear or other evidence that any portion of the funds represented by such checks was the separate property of plaintiff. [621]

* * * * * * * *

Mr. Robinson: I believe the amendment to the claim for refund sets that out as a ground of the claim, payment from her separate fund, isn't that right?

(Testimony of Catherine B. Ferry)

Mr. Mitchell: The protest contains a statement that some of the premiums were paid with new type community, some with the husband's separate funds, and some with the wife's separate funds, the 1940 protest.

The Court: Those are all matters that we will have to give consideration to. I will deny the motion to strike, permit the evidence to stand, and exception to the Government.

Q. By Mr. Mitchell: Mrs. Ferry, you have no idea, have you, of the amounts of money deposited by Mr. Ferry in the year 1925 in these bank accounts?

A. No; I wouldn't know.

Q. That the court was just referring to?

A. I couldn't remember any of the amounts.

Q. Or the amounts of deposits made by him in those accounts in the year 1926? A. No; I wouldn't

Q. Or the year 1927?

A. I wouldn't know the amounts just offhand.

Q. Or the year 1928?

A. I just said I wouldn't know. Oh, you mean—
[623]

Q. I am referring to the different years now.

A. Yes.

Q. Your answer is "No" in respect of all the years I have mentioned so far?

A. You mean what we deposited?

Q. No; what Mr. Ferry deposited, what Mr. Ferry personally deposited in those accounts?

A. Oh, I wouldn't know; no.

Q. Or the years 1929, 1930, '31, '32, '33, '4, '5; your answer is the same in respect of all those years?

A. Yes.

(Testimony of Catherine B. Ferry)

Q. You have no idea, do you, of just exactly where he got the funds he deposited in those bank accounts from the year 1925 through 1935?

A. Well, we got from the trusts.

Q. You say he got some funds from the trusts?

A. I say we got the funds from all the trusts through those years.

Q. I am speaking now of the source of funds which Mr. Ferry deposited in those 11 years.

Mr. Robinson: I submit the question is ambiguous, an attempt to confuse the witness.

Mr. Mitchell: I am trying not to confuse the witness, your Honor.

The Court: I think it is clear. I think Mrs. Ferry can answer. [624]

Mr. Mitchell: Do you understand my question? You have stated one source that he may have gotten funds, that is the trusts; he may have gotten some that he deposited in these accounts from the trusts, is that correct?

A. Yes.

Q. Do you know where he got all the other funds that he deposited in these accounts, or whether he deposited any other funds; you don't know of your own knowledge, do you?

A. Well, when we had the rents, had the rents from the different properties.

Q. When he collected rents he made the deposits. Do you know exactly what bank he deposited them in, of your own knowledge? Did you see him do it?

A. Well, I couldn't just remember. I couldn't say what bank he put them in.

(Testimony of Catherine B. Ferry)

Q. And you have no idea, have you, of the amounts of the funds that he withdrew from those bank accounts during those 11 years?

A. Oh, not right offhand, I don't think I do.

Q. Could you ascertain exactly how much he drew from those accounts by check or otherwise?

A. In what year?

Q. The years 1925 through the year 1935, prior to his death? A. Oh, no; I couldn't.

Q. You could not find that out? [625]

A. No; I could not.

Q. You don't know the total amount of money received by Mr. Ferry in any one or more of those 11 years, do you?

A. The total amount from what do you mean?

Q. From all sources. A. Oh, no.

Q. Received by Mr. Ferry during those 11 years?

A. No.

Q. You don't know that. Or where he got money that he received during those 11 years?

A. No; I don't.

Q. You don't know either, do you, the amount of his obligations and expenses paid out by him during any one or more of those 11 years? A. No.

Q. But you do know that he provided well for the family? A. Yes.

Q. Did you keep books or records of the family expenses? A. No; I didn't.

Q. You were not limited as to the amount of money you could spent for the family in any one month, for the family support, were you? A. No.

Q. I mean by Mr. Ferry or anyone else?

A. No. [626]

(Testimony of Catherine B. Ferry)

Q. Or the amount you could spend on the clothing and education of the children? A. No; I was not.

Q. Mr. Ferry also spent money for the support of the family, didn't he, besides you?

A. Oh, I guess he did.

Q. And on the education of the children?

A. Oh, surely.

Q. Other than moneys expended by you personally, I mean? A. Surely. [627]

* * * * *

Los Angeles, California, Tuesday, June 8, 1943, 10:00 a. m.

Mr. Mitchell: If the Court please, there were a number of statements from insurance companies, stating the amounts of premiums paid and the times that they were paid, in all cases except that of Metropolitan Life Insurance Company, by plaintiff, over objection of the defendant, and counsel for the plaintiff how has a similar statement in respect to the Metropolitan Life Insurance Company, which he will probably desire to introduce, and I have no objection as to the time that they are offered.

Mr. Robinson: Even though it is out of order?

Mr. Mitchell: Even though counsel has rested, I am willing that the case be opened for that purpose.

Mr. Robinson: I believe they were offered before in evidence with the understanding that they would go into evidence when produced. I offer Metropolitan Life Insurance Company memorandum, on Policy No. 1032329-A upon the life of Peter Ferry, showing the amount of premiums paid, and the dates of payments.

The Clerk: That will be Plaintiff's Exhibit 61.

(The document referred to was marked as Plaintiff's Exhibit 61, and received in evidence.)

[Note: Plaintiff's Exhibit No. 61 will be found in the Book of Exhibits at page 828.]

Mr. Mitchell: By the way, the defendant makes the same objection that was made in respect to the other offers and on the same grounds. [629]

Mr. Robinson: So understood. Likewise I offer memorandum, Metropolitan Life Insurance Company, on Policy No. 1032491-A, upon the life of Peter L. Ferry, showing the amount of premiums paid, and the dates of said payments.

Mr. Mitchell: Same objection, upon the same grounds.

The Clerk: Plaintiff's Exhibit 62.

(The document referred to was marked as Plaintiff's Exhibit 62, and received in evidence.)

[Note: Plaintiff's Exhibit No. 62 will be found in the Book of Exhibits at page 830.]

* * * * *

WESLEY L. KINNEY,

called as a witness by and on behalf of the defendant, having been first duly sworn, was examined and testified as follows:

The Clerk: Your full name?

The Witness: Wesley L. Kinney.

Mr. Robinson: Mr. Mitchell, to expedite matters, I will stipulate to the qualification of the witness, and the fact that he brought with him the files of the Superior Court of the County of Los Angeles, State of California,

(Testimony of Wesley L. Kinney)

in the matter of Ferry vs. Parker, No. 261347, and that it is an official file of the Clerk of the Superior Court of [630] Los Angeles County.

Mr. Mitchell: I will now ask counsel whether he will stipulate, rather than introduce the files, your Honor, just to certain contents of them; that this is a suit to foreclose a mortgage brought by plaintiff in this case and the decedent.

Mr. Robinson: It was filed the 16th day of September, 1928.

Mr. Mitchell: I have never seen these files before, your Honor. All I have are extracts. That the suit is against Edith J. Parker and various John Does; that the action is brought to foreclose a mortgage securing a note dated December 1, 1925, signed by Edith Parker and payable to Peter L. Ferry and Catherine B. Ferry, his wife, plaintiffs in the case, in the principal amount of \$6336.00.

Mr. Robinson: I will so stipulate.

Mr. Mitchell: And to secure the payment of that note a mortgage was executed by the maker of the note, Edith J. Parker, a widow, called mortgagor, and Peter L. Ferry and Catherine B. Ferry, mortgagees, dated the same day as the note.

Mr. Robinson: I will so stipulate.

Mr. Mitchell: And that the property described in the deed of trust and in the complaint is Parcel 14 of Trust 6204, Parcel 14 being the parcel number used in the Stipulation of Facts.

Mr. Robinson: I will so stipulate. [631]

The Court: You stated that was Parcel 14, Mr. Mitchell?

(Testimony of Wesley L. Kinney)

Mr. Mitchell: Yes, your Honor, Parcel 14.

The Court: You gave the trust number as 6204, and the tract number is 8725, on page 12.

Mr. Mitchell: The Stipulation of Facts, if the Court please, of many, many pages, relates to certain parcels of property that were transferred to Trust No. 6204. Exhibit K, attached to the Stipulation of Facts, is the Declaration of Trust No. 6204, and attached to it, in the Stipulation of Facts is a schedule of 38 parcels, numbered from 1 to 38. Counsel is now stipulating that the property involved in this suit was Parcel 14, contained in that list, and referred to in other pages of the Stipulation of Facts by an arbitrary numbering system that was used in the Stipulation of Facts. And will counsel stipulate that the decree of foreclosure was entered in this case, dated the 2nd of November, 1928, and filed and entered November 5, 1928, wherein R. E. Allen was appointed commissioner to sell the property which we have just referred to.

Mr. Robinson: I will so stipulate.

Mr. Mitchell: And R. E. Allen, commissioner, is the one referred to in the Stipulation of Facts, on page 20 of Plaintiff's Exhibit 1, lines 24 to 28, referring to R. E. Allen, commissioner, and grantor under commissioner's deed, and relating to Parcel 14 of Trust 6204? Do you so stipulate?

Mr. Robinson: I so stipulate. [632]

Mr. Mitchell: That is all.

Mr. Robinson: Will you stipulate, Mr. Mitchell, that on the 11th day of January, 1929, there was filed in this matter a return of commissioner, wherein he recited that he had sold unto Peter L. Ferry and Catherine B. Ferry the real property in question for a total sum of \$9872.59?

Mr. Mitchell: So stipulated. Will counsel stipulate that the deputy county recorder has brought the original official records of the County of Los Angeles, State of California, and Volumes numbered 9538, 9315, 5775, 6395, 6580 and 6735?

Mr. Robinson: I will so stipulate.

Mr. Mitchell: Will counsel stipulate that there is recorded in Book 6580 of the official records of the County Recorder's office of Los Angeles County, California, on page 31 et seq., a trust deed dated November 30, 1926, between Anna T. Perry and Bert L. Perry, her husband, trustors, Johnston Finance Corporation, trustee, and Peter Ferry and Catherine B. Ferry, his wife, as joint tenants, with the right of survivorship, beneficiaries?

Mr. Robinson: I will so stipulate.

Mr. Mitchell: And that this deed of trust is given to secure a note for \$3278.48, dated November 30, 1926, signed by the trustors, Mr. and Mrs. Perry, payable to the beneficiaries of the trust deed, Mr. and Mrs. Ferry, as joint tenants, and that the deed of trust covers Parcel 6 [633] of the Stipulation of Facts, relating to Trust 6204?

Mr. Robinson: I will so stipulate.

Mr. Mitchell: Will counsel also stipulate that in the margin, on page 31, there appears the following endorsement: For reconveyance see book 12656, page 358, official records?

Mr. Robinson: I will so stipulate.

Mr. Mitchell: And also the fact that the trust deed recites that it is given second and subject to a deed of trust securing a note for \$2500, to be filed concurrently herewith?

Mr. Robinson: So stipulated.

Mr. Mitchell: Will counsel stipulate that on page 49, et seq., of book 5775 of the official records of the county recorder of the County of Los Angeles, State of California, there is recorded a trust deed, dated January 5, 1926, wherein Fred R. Barber is named trustor, Title Insurance & Trust Company, a corporation, of Los Angeles, is named trustee, and Joseph Fink, a married man, is called beneficiary?

Mr. Robinson: I will so stipulate.

Mr. Mitchell: And wherein it is provided that the trust deed covers Lot 13 in Block F of Tract 7600, and that piece of property is Parcel 8 of Trust 6204, referred to in the Stipulation of Facts?

Mr. Robinson: I will so stipulate. [634]

Mr. Mitchell: And that the note secured by this trust deed is a note signed by Fred R. Barber, maker, dated January 5, 1926, and is payable to Joseph Fink or order?

Mr. Robinson: I will so stipulate.

Mr. Mitchell: I will now ask counsel to produce the trustee's deed relating to this parcel, to Mr. and Mrs. Ferry, which is referred to in the Stipulation of facts.

Mr. Robinson: Is that the one you requested of me the other day, counsel?

Mr. Mitchell: No. 8. I will ask counsel to bring this afternoon the deed referred to in the Stipulation of Facts, from the trustee under this Title Insurance & Trust Company trust, to Mr. and Mrs. Ferry, dated October 5, 1927, for the sole purpose of showing that the deed of trust contained in the record to which we have just referred was assigned by the beneficiary, Joseph Fink, to Mr. Ferry or Mr. and Mrs. Ferry—I don't recall what the deed recites. I think it is material.

Mr. Robinson: Do you wish the Parcel 6 deed at this time?

Mr. Mitchell: Yes. Will counsel stipulate that—

Mr. Robinson: Let the deed go in.

Mr. Mitchell: The defendant offers joint tenancy deed from Bert L. Perry and Anna T. Perry, husband and wife, to Peter L. Ferry and Catherine B. Ferry, husband and wife, as joint tenants, to the property referred to in the [635] Stipulation of Facts as Parcel 6, as defendant's next exhibit in order.

The Clerk: Defendant's Exhibit U into evidence.

(The document referred to was marked as Defendant's Exhibit U, and received in evidence.)

[Note: Defendant's Exhibit U will be found in the Book of Exhibits at page 1037.]

Mr. Mitchell: I don't believe it will be necessary to produce 8, because I have the record here, I think.

Mr. Robinson: Mr. Mitchell, may it please the Court, may I ask if you are endeavoring to alter or vary the terms of our written stipulation by these deeds?

Mr. Mitchell: No. Going now to the deed referred to in the Stipulation of Facts, whereby Parcel 8 was conveyed to Mr. and Mrs. Ferry, as trustee's deed, upon the sale dated the 5th day of October, 1927, wherein the Title Insurance & Trust Company is first party, the trustee, and Peter L. Ferry and Catherine B. Ferry, husband and wife, as joint tenants, are parties of the second part, as grantees, will counsel stipulate that this trustee's deed upon sale recites as follows: Whereas said note has been assigned by said Joseph Fink to Peter L. Ferry and Catherine B. Ferry, his wife, as joint tenants?

Mr. Robinson: I will so stipulate.

Mr. Mitchell: And it also recites: That a declaration of default and demand for sale was made by Mr. and Mrs. Ferry to the trustee, Title Insurance & Trust Company, and that the declaration of default was signed by Peter L. Ferry [636] and Catherine B. Ferry, and was delivered to the Title Insurance & Trust Company on the 4th of June, 1927, and that on June 8, 1927, there was filed for record in the same recorder's office, in Los Angeles County, a notice of said breach and/or default and of election to cause the trustee to sell the property after three months.

Mr. Robinson: I will so stipulate, with the exception that the notice of default was not to the Title Insurance & Trust Company, but to the debtor.

Mr. Mitchell: That correction is accepted, of course. And that the notice of breach and/or default and election to cause the trustee to sell the property was recorded in book 6725 of official records of the same county, at page 49?

Mr. Robinson: I will so stipulate.

Mr. Mitchell: Will counsel stipulate that there is recorded in book 6395 of the official records of the County of Los Angeles, California, at page 29, et seq., thereof a deed of trust dated July 28, 1926, wherein Martin M. Spencer and wife appear as trustors, and Title Guarantee & Trust Company appears as trustee, and Glendale State Bank, a corporation, appears as beneficiary?

Mr. Robinson: I will so stipulate.

Mr. Mitchell: That this deed of trust covers Lot 18 of Tract 3659, in the City of Burbank, Los Angeles County, California?

Mr. Robinson: I will so stipulate. [637]

Mr. Mitchell: And that the deed of trust is subject to a mortgage for \$1600, filed concurrently herewith, and that it is executed for the purpose of securing the payment of the indebtedness evidenced by a promissory note signed by Martin M. Spencer and wife, dated July 28, 1926, in the principal sum of \$1100.09?

Mr. Robinson: I will so stipulate.

Mr. Mitchell: And that the property just described is Parcel 29 used in the Stipulation of Facts, relating to Trust No. 6204?

Mr. Robinson: So stipulated.

Mr. Mitchell: Will counsel stipulate that there is recorded in book 9315 of the official records of the County of Los Angeles, California, at page 327 thereof, a notice of default and election to sell by individual, signed by Peter L. Ferry?

Mr. Robinson: I will so stipulate, reserving the right to object to the competency thereof.

Mr. Mitchell: And dated the 30th day of September, 1929, and that this declaration of default and election to sell recites that notice is hereby given that the undersigned, the owner and holder of that one certain promissory note in favor of Glendale State Bank, a corporation, and assigned to Peter L. Ferry, a married man, secured

by a deed of trust, by Martin M. Spencer and wife, as joint tenants, to Title Guarantee & Trust Company, a corporation, as trustee, and [638] recorded in book 6395, page 29 of official records of Los Angeles County, California; and further recites that there has been a default in the payment of the principal of said note, and all interest due and payable thereon in accordance with the terms thereof?

Mr. Robinson: I so stipulate.

Mr. Mitchell: And further, by reason of such default, the undersigned, the owner and holder of said note and deed of trust, has exercised his option and has declared, and goes hereby declare said indebtedness, and all sums secured by said deed of trust, immediately due and payable, and that the undersigned elects to cause the property described in the deed of trust above referred to, the record of which is made a part of this notice of the description of the premises, to be sold in accordance with the provisions thereof, to satisfy said obligation?

Mr. Robinson: I will so stipulate, although, may it please the Court, I move to strike—

Mr. Mitchell: By the way, in the last, will counsel stipulate that the declaration of default also relates to Parcel 29, Trust 6204?

Mr. Robinson: I don't know. I do not see any description contained in that. If you say it does, I will accept your word for it.

Mr. Mitchell: I think the record shows it. [639]

* * * * *

CULBERT W. FARIES,

called as a witness by and on behalf of the defendant, having been first duly sworn, was examined and testified as follows:

The Clerk: What is your full name?

The Witness: Culbert W. Faries.

Direct Examination

By Mr. Mitchell:

Q. Mr. Faries, are you assistant trust officer and assistant secretary of the First National Bank of Los Angeles? [641]

A. I am.

Q. Mr. Faries, have you brought with you the Bank's records in Trust No. 5869 and Trust No. 4358?

A. I have here the original ledgers for the Bank from the inception of those trusts.

Mr. Mitchell: I believe, Mr. Robinson, that your Exhibits 43 and 44 were taken from this ledger?

Mr. Robinson: I believe they were taken from recapitulation sheets, which I assume were based upon the ledgers. They were checked against your records, which you had the agent of the bureau prepare.

Q. By Mr. Mitchell: Mr. Faries, without introducing the records, I will ask you to whom distributions were made—to whom were the checks made payable for distribution during 1925 through 1932.

A. In which trust?

Q. In No. 5869. [642]

* * * * *

Mr. Mitchell: May I point out to your Honor, and also for the purpose of the record, that Exhibit 43 relates to Trust S-5869, Security-First National Bank of Los Angeles, and includes distributions made during certain

(Testimony of Culbert W. Faries)

months in the years 1925 through the year 1935, June 10th, six days before the death of the decedent. At the foot of Exhibit 43, page 2, is the following entry: "Total for Catherine Ferry, \$7,826.78." I stipulated that the amounts were correct, subject to checking, and I am now checking, and I think I should be permitted to do it by the same witness.

The Court: Go ahead.

Q. By Mr. Mitchell: Now, Mr. Faries, to whom was distribution made in the year 1925, in so far as Trust No. 5869 was concerned?

Mr. Robinson: I object to the question as calling for [643] the conclusion of the witness.

Q. By Mr. Mitchell: As shown by your records.

* * * * *

The Witness: My I have the question?

Q. By Mr. Mitchell: To whom was distribution from this trust made in the year 1925? [644]

* * * * *

A. According to the record of Trust No. 5869, of Security Trust & Savings Bank, now designated as Trust No. S-5869, Security-First National Bank of Los Angeles, successor trustee, the payments made in the year 1925 were as follows:

On April 10th, Mrs. Mary B. O'Brien, \$25; on May 11th, Mrs. Mary B. O'Brien, \$25; each of those payments is designated as "Monthly allowance".

On January 10th, Mrs. Mary B. O'Brien, monthly allowance, \$25; on July 19th, the same payment, \$25, to the same person; on August 10th, Mrs. Mary B. O'Brien, monthly allowance, \$25.

(Testimony of Culbert W. Faries)

On August 19th, a series of payments as follows: Mary Alice Ferry, net income, \$76.86; Peter L. Ferry, net income, \$76.86; Catherine B. Ferry, net income, \$76.86; Peter L. Ferry and Catherine L. Ferry, for account of James B. Ferry, \$76.86; Peter L. Ferry and Catherine L. Ferry, for account of Peter Leo Ferry, \$76.86; Peter L. Ferry and Catherine L. Ferry, for account of Catherine Helen Ferry, \$76.86; Peter L. Ferry and Catherine L. Ferry, for account of John Marvin Ferry, \$76.86; Peter L. Ferry and Catherine L. Ferry, for account of William Francis Ferry, \$76.86.

Q. Is that all on August 19th, 1925? [645]

A. Those are all of the entries on this date. [646]

* * * * *

Q. By Mr. Mitchell: I call your attention now to September 12, 1927, and will ask the entries for that particular date, in so far as Peter L. Ferry is concerned.

A. According to our records—

Mr. Mitchell: The item I am referring to is the \$2000 item. That is the item omitted from Exhibit 43.

Mr. Robinson: I challenge your statement. None of the distribution to Peter L. Ferry is contained in Exhibit 43. The only items contained therein are items to Catherine B. Ferry.

Q. By Mr. Mitchell: Do you find a \$2000 item?

A. According to the records of the same trust, on September 12, 1927, payment was made to Peter L. Ferry, payment on account of income, \$2000.

Q. Were similar entries as of that date, or on or about that date, made in payment on account to any of the other beneficiaries?

A. On September 8, 1927, there were other entries made to other individuals. [647]

(Testimony of Culbert W. Faries)

Q. What were the amounts?

A. On September 8, 1927, there were the following entries: To Mrs. Mary B. O'Brien, monthly allowance, \$25. Then follow eight entries of \$80.09 each, paid as follows: Do you want all the names?

Q. Only one. A. Peter L. Ferry—

Q. That's enough; the rest of the beneficiaries for the trust got \$80.09 on that day.

A. Catherine B. Ferry; and then the same people as we have mentioned before.

Q. I will ask you to determine whether or not the \$2000 received, as your record shows, by Mr. Ferry, on September 12, 1927, is a sum in addition to the regular monthly distributions to all of the eight beneficiaries? What I mean is, is that \$2000 in excess of the amount that was received by the other beneficiaries?

The Court: If there were eight beneficiaries, and they got \$80 apiece, that would make it \$640.

A. This record is silent.

Q. By Mr. Mitchell: Does the record from there on show equal distribution to Mr. Ferry with a balance to the beneficiaries until the time of his death?

A. It does, in October and November, and in December of 1927, and again—

Q. You might go right through until June, 1935; then [648] if there is any change in the amount of distribution to the eight beneficiaries, including Mr. Ferry, you can tell us what that is. [649]

* * * * *

Mr. Robinson: I will stipulate that on each date set forth in Exhibit 43, a payment shown as having been

(Testimony of Culbert W. Faries)

made to Mr. Ferry, that a like payment was made to Mrs. Ferry.

Mr. Mitchell: And that in addition thereto Mr. Ferry received a \$2000 distribution on the 12th of September, 1927?

Mr. Robinson: Your evidence is in on that, Mr. Mitchell. [651]

Mr. Mitchell: All right.

Q. Mr. Faries, I will now ask you whether there were changes in the number of beneficiaries upon the births of children of the beneficiaries.

A. Can you give me the dates?

Mr. Mitchell: Will counsel stipulate?

Mr. Robinson: We already stipulated that there was an amendment to the trust, and we stipulated the date and contents of the amendment, and it was read into the record.

Mr. Mitchell: All right.

Q. I now call your attention to your Trust No. 4358, wherein Pacific Southwest Trust & Savings Bank was the original beneficiary. Have you all those ledger sheets also, Mr. Faries? A. I have.

Q. I will ask you to whom distribution of all of the income of this trust was made during the year 1926 up to and including January 30, 1933. I am referring to all of the income from the trust.

A. According to the records of Trust No. 4358 of Pacific Southwest Trust & Savings, now designated as Trust No. SS-4358 of Security-First National Bank of Los Angeles, successor trustee, as trustee for Peter L. and Catherine B. Ferry, with the exception of the payment of January 22, 1926, for which this record is short the name

(Testimony of Culbert W. Faries)

of the payees; it merely states the monthly payment of income due, \$535— [652] in the year 1926 the remaining payments are made to Peter L. and Catherine B. Ferry, and are designated monthly payment of income, and in the amount of \$535.

Q. That's the year 1926?

A. Yes. For the year 1927, payments were made monthly in the amount of \$535 to Peter L. Ferry and C. B. or Catherine B. Ferry, and designated monthly payment.

Q. I will ask whether payments were made to anyone other than them.

A. That will take minute examination, Mr. Mitchell.

Mr. Mitchell: Will counsel stipulate that all of the income was so distributed?

Mr. Robinson: I assume that it was. If you will state it as a fact, I will so stipulate.

* * * * *

The Court: Is that according to your records?

A. In 1927 I find no record of any payments made to [653] the children.

The Court: That is what the exhibit shows on the face of it?

Mr. Robinson: All we covered are those made up to and including January 30, 1933; the only payments made under the trust were those set forth in Exhibit 43, and therefore, from March 1, 1933, to the end of the trust, the items set forth in the exhibit were paid to Catherine B. Ferry. Does that cover it?

Mr. Mitchell: No, it does not cover it. I accept the portion of counsel's offered stipulation, that is, through January 30, 1933. Beginning March 1, 1933, will coun-

(Testimony of Culbert W. Faries)

sel stipulate that all of the distribution was made to the seven or eight beneficiaries in the amount of the same amounts that were received by Catherine B. Ferry, from March 1, 1933, until the time of death?

Mr. Robinson: 1933?

Mr. Mitchell: 1933 until the time of death.

Mr. Robinson: I assume that's a fact, Mr. Mitchell; I will so stipulate.

The Court: Very well.

Mr. Mitchell: That probably will clarify the statement at the bottom of this exhibit 44, bottom of page 3, which gives the total paid solely to Catherine B. Ferry, but omits the amount distributed to the children. [654]

* * * * *

Q. What you state in respect of the checks being in storage applies to both of these trusts, I assume?

A. It does.

Q. They are both available? A. Yes.

Mr. Mitchell: That is all.

Cross-Examination

By Mr. Robinson:

Q. The \$2000 item in Trust No. 5869, do you have that available there? A. Yes.

Q. What is the language contained in this entry, as to that item?

A. On September 12, Peter L. Ferry, payment on account, check \$2000. The balance in the income after the payment of this \$2000 was \$2311.32. There follows another entry of the same date, setting up \$5000 par value certificate of assignment to beneficial interest in and to that certain trust created October 25, 1924, between Bert Farrar, Inc., and Security Trust & Savings Bank,

(Testimony of Culbert W. Faries)

known as Trust 5819, [655] and covering certain real estate, being an undivided 55/774 interest. And under Investments, no cash transactions; under Investments, it shows a credit of \$55,000, and a balance, under Investments, of \$179,548.75.

Q. Can you tell whether or not the \$2000 was a portion of the consideration for that transfer to the trust?

Mr. Mitchell: I think the witness should be asked if he can explain that entry which he has just read.

The Court: It is cross examination.

Mr. Mitchell: All right.

The Court: He can assume any facts he cares to.

A. The \$2000 item speaks for itself: Peter L. Ferry, payment on account, income. The other entry has no connection except that it happened to appear on the same date.

Q. By Mr. Robinson: Do you know whether or not that \$2000 was ever paid back? A. I do not know.

Q. Do you know whether or not Mr. Ferry parted with any consideration for the \$2000?

A. This record does not show.

Mr. Robinson: That is all.

Mr. Mitchell: We now offer in evidence Defendant's Exhibit B for identification, a certified copy of a letter dated February 20, 1940, addressed to Catherine B. Ferry, executrix, care of Claude I. Parker, which gave rise to plaintiff's protest of 1940. [656]

* * * * *

The Clerk: Defendant's Exhibit B admitted into evidence.

(The document referred to, heretofore marked as Defendant's Exhibit B, for identification, was received in evidence.) [657]

(Testimony of Culbert W. Faries)

[Note: Defendant's Exhibit B will be found in the Book of Exhibits at page 843.]

* * * * *

Mr. Mitchell: If the Court please, I have checked Exhibit 41, Plaintiff's Exhibit 41, Distribution of Income to Peter and Catherine Ferry, of the Citizens National Trust & Savings Bank, and find that my record shows that such total distribution was \$11,281.99 instead of the total typed on Exhibit 41, of \$11,475.86.

Mr. Robinson: I won't quibble with you, if you say that is the figure; I will accept your statement.

Mr. Mitchell: If counsel will so stipulate I will accept it. [658]

* * * * *

The Court: I have written on Exhibit No. 41, the following, with the consent of counsel: "\$11,281.99 stipulated to be correct amt. and not \$11,475.86 as stated above." Is that satisfactory?

Mr. Mitchell: Yes, your Honor.

Mr. Robinson: That is satisfactory. [659]

* * * * *

Mr. Mitchell: If the Court please, a number of original documents of the Government's official records have been introduced from time to time, and others will be offered from Defendant's Exhibit F for identification, and I would like to have a blanket order now that copies may be substituted for originals, so that they may be returned to the official custodian after the trial.

The Court: The order will be so made.

Mr. Mitchell: Will Mrs. Ferry take the stand now, please?

CATHERINE B. FERRY,

recalled as a witness by and on behalf of defendant, having been previously duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Mitchell:

Q. Mrs. Ferry, during his lifetime, during your marriage, Mr. Ferry did not make it a practice to tell you each time he spent money for the house?

A. No, I wouldn't say he did.

Q. Or for the children?

A. Each time, do you mean?

Q. Did he made it a practice to tell you each time when he spent money for the children? [660]

A. Well, I wouldn't say; I wouldn't remember.

Q. Did he make a practice of telling you when he gave money to the children? A. Do you mean cash?

Q. Yes.

A. Well, I wouldn't be able to answer whether he would tell me each time, or not.

Q. He did not make a practice of telling you each time he did that, did he?

A. Well, I think he wanted me to keep in touch with what he gave them.

Q. Did he make a practice of telling you when he paid dues to the Elks Lodge, for example?

A. Do you mean would he just sit down and tell me he was going to pay them?

Q. Yes, and the amount? A. No.

Q. He did not make a practice of telling you each time he borrowed money, did he?

A. No, he didn't.

(Testimony of Catherine B. Ferry)

Q. Did you know before Mr. Ferry died that Mr. Ferry had borrowed money on his Pacific Mutual Life Insurance policy, Exhibit 40 in this case?

A. I remember hearing him talk about it, but I wouldn't mention the date.

Q. He did not consult you before he borrowed the money, [661] I presume, did he?

A. Well, I heard him talking about going to borrow on it.

Q. Do you know how much was owing on that loan at the time of his death?

A. No, I couldn't say.

Q. He took care of this himself, didn't he?

A. Yes, he took care of all the business.

Q. Did you know that prior to Mr. Ferry's death that he had borrowed money on the following Equitable Life Insurance policies: Exhibits 13, 14, 15, 16, 17 and 18 in this case?

A. Yes, he always talked it over when he was going to borrow money from insurance.

Q. When did he borrow money on those policies?

A. When did he?

Q. Yes. A. I wouldn't remember any dates.

Q. How much did he borrow?

A. That I couldn't say.

Q. Haven't you any idea at all?

A. No, I haven't.

Q. What did he do with the money that he borrowed, do you know?

A. I don't know.

Q. Do you know why he wanted to borrow money on his [662] Pacific Mutual policy?

A. No, I don't.

(Testimony of Catherine B. Ferry)

Q. He did not tell you?

A. No. He attended to all the business, and I had to trust him. I had great trust in him.

* * * * *

Q. Mrs. Ferry, the evidence shows that in his 1924 income tax return Mr. Ferry reported income from 14 frame dwellings; rentals from 14 frame dwellings. I am referring to Defendant's Exhibit H. Do you recall the 14 frame dwellings that were owned at that time?

A. Well, I could think of 11 or 12 of them.

Q. Do you remember how long they were retained?

A. No, I don't.

Q. Do you remember where they were located?

A. That's all I can think of.

Q. Yes. A. Yes, I do.

Q. Where were they located?

A. Well, there were—

Q. Were they all in a group together? [663]

A. No.

Q. Scattered? A. Yes.

Q. I don't want you to tell us if they were scattered. I thought they were probably together. I believe you have already testified that prior to Mr. Ferry's death he made out whatever separate returns there were that were filed in your name?

A. He attended to that entirely.

Q. Prior to his death? A. Yes.

Q. And he brought the return to you, and you signed it? A. I signed it, and he had it notarized.

Q. But you always did read it first, didn't you?

A. Yes, I always read it, but I don't remember anything that was in it.

(Testimony of Catherine B. Ferry)

Q. You don't remember the contents now of them?

A. No.

Q. But you knew at the time what the contents were?

A. Well, as far as I was able.

Q. So that you couldn't explain the various items that were contained in those returns, prior to his death?

A. No, I would not be able to.

Q. Nor what certain items were included, nor what certain items were omitted?

A. No, I just trusted to Mr. Ferry [664]

Mr. Mitchell: May I have Plaintiff's Exhibits 41 through 47? Did you introduce them this morning?

Mr. Robinson: I will introduce it at this time, if there is no objection.

Mr. Mitchell: No objection, of course.

Mr. Robinson: At this time we offer in evidence dates and amounts, showing distributions of income from Trust No. 1052, Title Guarantee & Trust Company.

Mr. Mitchell: My record shows that that is the document from which I examined Mr. Kinney this morning from a carbon copy, thinking the original was in.

Mr. Robinson: I wish to apologize. I thought the original was in also.

Mr. Mitchell: I did, too.

The Clerk: That is Plaintiff's 63 into evidence.

(The document referred to was marked as Plaintiff's Exhibit No. 63, and received in evidence.)

[Note: Plaintiff's Exhibit No. 63 will be found in the Book of Exhibits at page 832.]

Q. By Mr. Mitchell: Mrs. Ferry, calling your attention to Plaintiff's Exhibit 43, being a statement of dis-

(Testimony of Catherine B. Ferry)

tributions to you personally, among the distributions of income from the Security-First National Bank of Los Angeles, Trust S-5869, which I believe originally was Pacific Southwest—is that correct?

Mr. Robinson: I believe it was.

Q. By Mr. Mitchell: Calling your attention to the first item which you received on August 19, 1925, the amount [665] being \$76.86, I will ask you in what bank that was deposited, if you recall. A. In what year?

Q. August 19, 1925, a check for \$76.86.

A. I wouldn't have any idea what bank.

Q. Have you any idea in what bank any one of these items over the period from 1925 down through June 10, 1935, were deposited?

A. The First National, I would say.

Q. Which items, for example, in the First National Bank?

A. I wouldn't know; I know we deposited a lot of checks there in Glendale.

Q. Those are the checks which, I believe, in answer to the Court's question, you stated you personally deposited? Do you recall the Judge asking you that?

A. If I personally deposited all those checks?

Q. Yes, checks that were payable to you.

A. Then I didn't understand the question. They went into the same account. Mr. Ferry may have taken them; I may have taken them.

Q. Do you recall making any of the deposits yourself, personally? A. Do you mean any of those checks?

Q. Yes.

A. There was never any personally, no; they all went [666] into the one account.

(Testimony of Catherine B. Ferry)

Q. Don't you recall receiving any checks payable to you personally? A. Yes.

Q. Do you recall in what bank, if any, you deposited those checks, or did you turn them over to someone else to make the deposit?

A. Sometimes Mr. Ferry made the deposit.

Q. Of checks payable to you?

A. Yes. They all went into the one account. [667]

* * * * * * * * *

The Court: She said in her testimony the other day that she endorsed those checks, and some of them were deposited by her, but mostly by Mr. Ferry; that she endorsed the checks, and all checks were deposited. I will permit you to go as far as you want on cross examination, because these questions are probably important.

Mr. Mitchell: I move at this time that all of the testimony of Mrs. Ferry concerning the deposit of checks be stricken upon all of the grounds heretofore mentioned in [668] the objection to such line of testimony, and upon the further ground now, as well as then, that it is not the best evidence, and that the record now shows that the checks are in existence and would show in what banks they were deposited, and who endorsed them.

The Court: The witness hasn't testified as to the exact banks, Mr. Mitchell, that the accounts were deposited in, so that part of the objection is not good. The fact that the deposits were made, that she has personal knowledge of, that she made herself, her recollection of them is the best evidence. The recollection of the person as to the actual deposit is the highest evidence.

Mr. Mitchell: If they were deposited, your Honor, yes, but as to being deposited in a certain bank—

(Testimony of Catherine B. Ferry)

The Court: The witness says she does not remember what bank they were in. The motion is denied.

Q. By Mr. Mitchell: Now, calling your attention to Plaintiff's Exhibit 44—I would like to make my offer, your Honor—relating to distributions made to you personally by the Security-First National Bank, from Trust No. 4358, commencing March 8, 1933, and ending May 29th, and ask you whether you can state in what bank you deposited those checks that were made payable to you.

A. Well, I would think the First National of Glendale.

Q. Are you positive of that, Mrs. Ferry?

A. I would say most of them, but I would not know [669] whether all were or not.

Q. Are you sure that you deposited all of them, or might Mr. Ferry have deposited some of them?

A. Oh, surely, he would deposit them.

Q. I am referring, of course, to checks that were payable to you. A. Yes.

Q. You don't know of your own knowledge in what bank Mr. Ferry deposited them, do you? You did not go with him to the bank? A. No, I wasn't with him.

Q. He didn't show you, when he returned, the pass book showing the entry of the deposit? A. No.

Mr. Mitchell: That is all.

Cross-Examination

By Mr. Robinson:

Q. Mrs. Ferry, what is your mother's name?

A. My mother's name is Mary Beal Brand.

Q. She is the same person named as beneficiary in some of these trusts? A. Yes.

(Testimony of Catherine B. Ferry)

Q. You testified that Mr. Ferry prepared the income tax, not only for yourself but for you, or both of you; is that right? A. Yes. [670]

Q. You had confidence in him in that regard?

A. I had all the confidence in the world in him.

Mr. Robinson: That is all.

Mr. Mitchell: If the Court please, the only exhibit that the Government has is Exhibit F for identification, the administrative file from the office of the Commissioner of Internal Revenue in Washington. I think I stated the purpose very completely yesterday.

The Court: Just to show that they have not considered the question of partnership?

Mr. Mitchell: No, your Honor. That's one of them.

* * * * *

The Court: On that point, Mr. Mitchell, the Government had copies of all of these trusts, didn't they?

Mr. Mitchell: Yes, your Honor. [671]

* * * * *

The Court: Then, if they read them, they knew that Mr. and Mrs. Ferry did not own all of the distributable part of those trusts?

Mr. Mitchell: They knew there were eight beneficiaries and if the trustee performed his duties, they distributed to all eight.

The Court: Do you mean they did not determine that themselves?

Mr. Mitchell: That wasn't an issue, and did not require an investigation, because no contention was made at that time that separate funds of Mrs. Ferry were used to

pay insurance policies. The only contention, as the evidence shows, was that it was community property of the type acquired since 1927. That portion of it belonged to Mrs. Ferry, and was used to pay premiums. That, of course, is all a matter your Honor is going to have to decide when the case is submitted. The protest does show—the protest of 1940, which was considered by the Technical Staff and by the Commissioner's office, that there was a statement [672] contained in that protest to the effect that not only was new type community property used, but also some separate property of Mr. Ferry and some separate property of Mrs. Ferry; just the broad statement to that effect. * * * [673]

* * * * *

The Court: Isn't it the duty of the man who is making the assessment for the estate purposes to determine who owns the property?

Mr. Mitchell: No, your Honor. We are getting away from this, but if your Honor cares for a discussion, then I will be glad to give it. [678]

* * * * *

The Court: I understand the Government is not bound by anything that is against them.

Mr. Mitchell: No, your Honor—

The Court: I have understood that thoroughly in this case; the Government is not bound by anything that appears to be against them.

* * * * *

The Court: Your position is that they can go in and close their eyes to a trust that is created by these people, and which the Government has put in front of them; that they are not supposed to look at it themselves?

Mr. Mitchell: I don't understand what your Honor is referring to by "in front of them."

The Court: They examined this trust? [679]

Mr. Mitchell: Yes; which consisted of the declaration of trust, and some books of the trustee.

The Court: By two people, the owners of that property?

Mr. Mitchell: That was not shown, your Honor.

The Court: They could have found it out.

Mr. Mitchell: Now your Honor reaches the point I am trying to make; the contention made by the taxpayer to the Commissioner, which your Honor apparently believes the Commissioner must rely upon at his peril—

The Court: He doesn't rely upon anything except those matters which are favorable to him. I have discovered that in this case.

Mr. Mitchell: I know of several cases—I haven't them at my finger tips—in which courts have held that the Commissioner was justified in relying upon a representation made under oath by the taxpayer to him, and that he is absolutely justified in relying on such verified statement, and is not obliged, at his peril, to investigate to see if the taxpayer was telling the Commissioner the truth.

The Court: The evidence here shows that he not only does not rely upon anything against him, but he does not rely upon a decision of the Supreme Court of the United States. He is a law unto himself, Mr. Mitchell, from the record in this case.

Mr. Mitchell: The Commissioner, of course, *if* bound by the Supreme Court decisions. [680]

The Court: The testimony here is that he did not follow one of those decisions.

Mr. Mitchell: It is quite probable that the Commissioner believed that the facts were not analogous to the

Supreme Court decision. The Commissioner has a legal staff of advisers to assist him, and counsel for the taxpayer might contend that the facts are identical with the facts involved in the case that went to the Supreme Court, and the legal staff of the Commissioner disagrees, because they believe that the facts are different. I think to that extent the Commissioner does not follow the Supreme Court decision, when he believes that the facts are not analogous, and obviously this is one of those cases. [681]

* * * * *

The Court: The law seems to be clear as to community property rights after July 29, 1927.

Mr. Mitchell: So far as income tax purposes are concerned, that is correct, your Honor.

The Court: But the Commissioner denies that, too.

Mr. Mitchell: Your Honor refers now to the alleged new type community property that was used to pay premiums on life insurance?

The Court: Yes, and he denies that.

Mr. Mitchell: Yes, your Honor. The tax returns show, as well as the estate tax return, and the protest, and other investigations made by the revenue agent, that Mr. Ferry was engaged, prior to 1927, in the contracting business. The evidence here shows that he continued to be in the [685] rental equipment business from 1929 until 1931. The evidence shows, by the income tax return filed, that he suffered a tremendous loss before the business was transferred to the son, James, and that the year before he suffered a loss also. There is no evidence—and the revenue agent did investigate to determine whether or not the decedent received any income attributable to toil and talent of the decedent exerted after July 29, 1927,

and he found none, and the taxpayer was unable to furnish it.

The Court: What about the evidence here as to all of the income Mrs. Ferry received; he also denies that.

Mr. Mitchell: Who denies it?

The Court: The Commissioner denies she received it,—

Mr. Mitchell: Any separate income?

The Court: Yes. That is their position. We are not interested in that, and therefore deny it.

Mr. Mitchell: I don't believe she offered any evidence until the trial that she received any separate income.

The Court: That is the evidence before this Court, that of this \$62,000 she received a large part of it.

Mr. Mitchell: About \$9,000, I believe.

The Court: That went into that joint account.

Mr. Mitchell: May I correct your Honor on the amount she received? The record, your Honor, now in evidence shows that Mrs. Ferry, from the various trusts, received up to the time of the decedent's death—I am speaking now of [686] Mrs. Ferry's personally—

The Court: Yes.

Mr. Mitchell: \$9,388.78.

The Court: That is apparently wrong, according to this exhibit.

Mr. Mitchell: Which exhibit is that?

The Court: Exhibit 44. It shows total payable solely to Catherine B. Ferry, \$1,562.00; total payable to Peter L. Ferry & Catherine B. Ferry \$46,327.43.

Mr. Mitchell: I take it that the evidence which is now in the record clearly establishes that Mrs. Ferry received the checks which were payable to her personally; if not, she can get on the stand and correct it. There is no

evidence that she received the funds that were payable to Mr. and Mrs. Ferry jointly.

The Court: What?

Mr. Mitchell: There is no evidence to that effect, your Honor.

The Court: Of course, there is. That is why we are so far apart in the interpretation. Here is the exhibit handed to me, which reads, "Total payable to Peter L. Ferry & Catherine B. Ferry, \$46,327.43." She testified she endorsed those checks, and they were deposited.

Mr. Mitchell: I don't recall that. If counsel wants to call her later to testify to that, he can.

The Court: Here are checks made out payable to Peter [687] and Catherine Ferry.

Mr. Mitchell: Yes.

The Court: Your position is that he could take them without endorsement and apply them as he liked?

Mr. Mitchell: Yes, that is possible.

The Court: Then Mr. Ferry would be in the position of an embezzler, and if it's in favor of the Government it's all right; if a man would take a check payable to two people, and endorse it, there is nothing to show it would be an embezzlement of that money if he cashed it, because it is separate property.

Mr. Mitchell: I agree with your Honor as to that, but, unfortunately, neither your Honor or I make the rules of evidence in tax cases.

The Court: I am not talking about the evidence but about the fact that this exhibit 44 shows that the checks were made out to Peter L. Ferry and Catherine B. Ferry.

Mr. Mitchell: Yes.

The Court: Unless there is some evidence here to show that Catherine B. Ferry never endorsed those checks,

I think we can assume that those checks were properly endorsed.

Mr. Mitchell: There is no evidence that the checks were made out in the name of Peter and Catherine Ferry. The evidence is that they were distributed in the name of Catherine B. Ferry and Peter Ferry, and your Honor might presume that the checks were so made out. The checks are [688] available, and as we indicated this morning, the burden is on the plaintiff to show that.

The Court: The second part of this, Mr. Mitchell, shows that Catherine B. Ferry received checks which were made out to her, in her name, for \$1,562.00. What is your interpretation of that?

Mr. Mitchell: I am willing to presume, your Honor, because I think your Honor will—

The Court: Don't go too far on that.

Mr. Mitchell: I will say this: I think your Honor will presume, from the evidence, the testimony of Mrs. Ferry and the testimony of the witness from the trustee bank, that those distributions were received by Mrs. Ferry, and that they were deposited in some bank by her.

The Court: There has been handed to me an exhibit showing to whom the checks were payable. That is headed "Payable to Peter L. Ferry and Catherine B. Ferry." The Government says to me, "Now, you are not to assume that they were made out in that way. You are not to assume that they were endorsed by Catherine B. Ferry, but are to assume, because it is our position, that they were endorsed and cashed by Peter L. Ferry, but Mrs. Ferry had nothing to do with it."

Mr. Mitchell: I am not asking your Honor to interpret that in any way at the moment. After the case is submitted, it will be our position that the plaintiff has not

proven [689] its case, that the separate funds of Mrs. Ferry were used in payment of life insurance premiums.

The Court: The testimony of Mrs. Ferry was that these checks were all deposited in the joint account. Checks have been introduced showing that out of that joint account premiums on insurance were paid. What more do you want?

Mr. Mitchell: I would prefer, your Honor, to write that in my brief, after the case is closed.

The Court: You can write anything you want in your brief, but I think the Court must get some of the issues clarified as we go along.

Mr. Mitchell: I will try to answer your Honor's question. There is no evidence, the best evidence, that these funds went into any bank. There is evidence that they were put into some bank by Mrs. Ferry. She is unable to produce her deposit book or pass book. She has not offered to produce the bank records to show she made deposits of those particular funds. She is not sure whether she deposited all. She is sure she deposited part of them; her husband deposited part of them into some deposit or checking account or savings account, but she does not know where Mr. Ferry deposited those that he deposited. There is no evidence as to the amount of funds that were in that checking account, or those checking accounts, at the time the checks were drawn. There is no evidence that Mr. Ferry did not have power to draw 100 per cent of the funds in those accounts to [690] pay his personal obligations. There is no evidence that Mr. Ferry did not know—in fact, there is evidence to show that Mr. Ferry did give Mrs. Ferry the right to draw on those accounts for household expenses and the support of the children in any unlimited amounts. There is no evidence of any other funds from other sources that

were placed in the account by Mr. Ferry; there is no evidence, therefore, that the checks drawn by Mr. Ferry in payment of premiums upon his life represented any of the funds which Mrs. Ferry may have deposited in banks. The evidence is not only not convincing, but it is totally absent.

The Court: Where did all this money go, half of the \$63,000, and half of the \$7,000?

Mr. Mitchell: The evidence does not show. Plaintiff has failed to establish that.

The Court: The evidence shows that it went into these banks. The evidence shows that every check, it was the understanding, was to be endorsed and deposited in the bank.

Mr. Mitchell: Some bank; not to be cashed; always run right through the bank.

The Court: Yes, that's right, and deposited in this joint account. That is the evidence. There are checks here that the Government has not denied yet that paid the premiums on these policies, that were drawn out of these accounts, that went into the joint accounts. I assume in the briefs the Government is going to deny that. [691]

Mr. Mitchell: The evidence shows that she called it a joint account. The evidence does not show whether it was a joint account in her own name, or an account on which Mr. Ferry had a right to draw. I don't think the evidence shows that.

The Court: She had a right to draw on that?

Mr. Mitchell: Yes.

The Court: What would that mean?

Mr. Mitchell: That might mean a number of things.

The Court: It assumes the fact, Mr. Mitchell, that her money was in it.

Mr. Mitchell: Some of her money was in it. Not only that, but there might have been ten times as much of his money in it. If it were his money she checked out for household purposes, it would be the discharge of support duties of the husband; if it were her moneys that were drawn out to discharge the duties it would then be given by her to the husband.

The Court: We have checks here to show that some of that money went to pay premiums on life insurance.

Mr. Mitchell: Some money, your Honor, in these joint accounts. There is no question about that, that some money that was in these accounts covered those checks.

The Court: That's right.

Mr. Mitchell: Whether that was money that Mrs. Ferry deposited, or whether it was money that Mr. Ferry deposited, [692] or some other type of money that he owned as his separate property, the evidence does not show.

The Court: It seems to me that the Government is going to contend in these cases that if two people have a joint back account, and one puts in a thousand dollars, and another puts in a thousand dollars, making two thousand dollars, and a check is drawn for \$500 to pay life insurance, that is not going to show whose money went out.

Mr. Mitchell: If the Court please, we don't know what the amount was, if they were tenants in common, in respect to the account.

The Court: Here is this academic problem I am giving you: The account stands in the name of one of the parties; the evidence shows that both contributed \$1,000 to it; that each could draw on it; and a check is produced which shows that \$500 of the \$2,000 went to pay a premium on a life insurance policy. There is no way to

show out of which thousand that \$500 came, that I know of.

Mr. Mitchell: May I assume further that \$500 remained in the bank, and if that was an obligation of the husband, and not of both spouses, it would be a gift by one spouse to the other of \$250.

The Court: It is susceptible to that interpretation, but my position is there is no way to tell out of which thousand that \$500 came, to pay that insurance premium.

Mr. Mitchell: There might be, your Honor. [693]

The Court: How?

Mr. Mitchell: If the plaintiff brought in a contract between the spouses respecting this bank account, assuming that it is in both of their names, showing that in respect of every penny that goes into this joint account they are joint tenants; that every penny that goes out represents half of the property, owned fifty-fifty by the two depositors; but that is established only by contract.

The Court: It is a difficult problem.

Mr. Mitchell: I concede, your Honor, that it is difficult to trace funds used in a case such as this back to the ownership of the person who never signed the checks to pay on the premiums. I realize that, but that is one of the burdens of a tax case, that these funds must be traced back to the ownership of the person who is not the insured, and who did not sign the check, or deliver the check, paying the premiums. It is quite a difficult task, and it is a hardship, of course; nevertheless, the burden exists, and we are helpless to change the rules of evidence in that respect.

The Court: The estate, as I take it, was also increased by the Commissioner—the value of the estate. In that respect then he also ignored, didn't he, all of the disposition made in the trust?

Mr. Mitchell: There are so many items in the estate, your Honor, it is difficult to pick out from the estate tax [694] return the items increased.

The Court: On page 6, the protest letter, dated April 5, 1940: "First: That the Commissioner has erred in increasing the gross estate"—

Mr. Mitchell: That is the first amendment?

The Court: Yes, that is the amendment to the complaint; the first amendment.

Mr. Mitchell: I find that amendment, and the exhibit attached to the amendment. What is the page?

The Court: Page 6, line 2.

Mr. Mitchell: "First: That the Commissioner has erred"?

The Court: Yes.

Mr. Mitchell: Counsel for the plaintiff, whose associate prepared the protest, might be in a better position to interpret it than I am. I think that is merely the general statement of the points he intends to raise in his protest. As I recall it, the report of revenue agent Eddy added some items, and also increased the value by 100 per cent, but as to only how much was included in the gross estate you would have to look at the estate tax return, to find out how much was included by the taxpayer. I don't believe that any was included, was it, in that tax return?

Mr. Wetzler: What is that?

Mr. Mitchell: The trust department, did it include any of it in that tax return? [695]

Mr. Wetzler: No, it was set forth that it was not taxable.

Mr. Mitchell: It was claimed it was not taxable in their tax return, your Honor, and Mr. Eddy added 100 per cent of the value of the trust corpus. So that made

an additional, about \$116,000—I think that is the increase referred to in plaintiff's 1940 protest.

The Court: I see on page 6 the protest refers to decisions of the California courts.

Mr. Mitchell: Yes, your Honor; the taxpayer relied upon California decisions.

The Court: The Circuit Court does not.

Mr. Mitchell: So does the Government at times.

The Court: The Circuit Court, as I recall, on community property matters, follows Washington, doesn't it—the State of Washington?

Mr. Mitchell: The Ninth Circuit, yes, your Honor.

The Court: We will take half an hour, gentlemen, and you can look over Exhibit F for identification, and see if you can dispose of that. How much more testimony have you then, Mr. Robinson?

Mr. Robinson: I am going to introduce into evidence two items. There will be no additional testimony, unless Mr. Mitchell has additional testimony. I have a man from our office who has made a recapitulation of items of interest, accrued interest, and items in the various trusts [696] set forth.

The Court: It is only a computation; as I understand it, it is merely a computation arrived at from an exhibit in the case?

Mr. Robinson: Is it in evidence?

Mr. Mitchell: No, only for identification, your Honor.

The Court: It is not in evidence?

Mr. Robinson: No, your Honor.

Mr. Mitchell: If counsel is offering it now—

Mr. Robinson: Yes; at this time I offer in evidence this summary of the Leslie report, showing the amount of accrued interest and income cash on hand set forth therein

from the various trusts, as reflected from the Leslie report, Exhibit No. 60.

Mr. Mitchell: The Government objects to this summary of the Leslie report on the same grounds that the Leslie report is not admissible, since it is not a part of this case. So far as I know, it is a report made by a California inheritance tax appraiser. Undoubtedly, it is a very good appraisal of the various items included in the trust, those in dispute and those not in dispute, but my chief objection is that the refund claim nowhere states that the income received, or accrued, in trust from the time of decedent's death was excludable from the gross estate, because it belonged to the beneficiaries and to the decedent, on the ground that such contention, such ground for recovery, [697] was never argued in either the refund claim or the protest—that is, the letter filed prior to the action on the refund claim, on the ground that that is excludable from the gross estate, or any other; that the grounds stated in the refund claim and protest, were never called, as the evidence shows, and will show as soon as Exhibit F is introduced, to the attention of any agent of the Government, any agent of the Commissioner, in connection with his consideration of the refund claim; and it is wholly immaterial for that reason. Neither was it alleged in the complaint. It is not an issue made by the pleadings. It is an entirely separate ground from the grounds alleged even in the complaint.

The Court: Call your witness.

Mr. Robinson: Mr. Mitchell, are you objecting that it is not the best evidence of his recapitulation, or is your objection based solely on the matters you have just raised?

Mr. Mitchell: I am objecting on the grounds I stated, Mr. Robinson.

Mr. Robinson: You aren't objecting on the ground that it is a recapitulation of a document not in evidence?

Mr. Mitchell: Not at all.

Mr. Robinson: With that in mind I will reaffirm my offer. If the Court accepts it, it will not be necessary to call my witness.

The Court: It may be offered in evidence and received [698] subject to the objection, of course.

Mr. Mitchell: On checking?

The Court: On checking.

The Clerk: Plaintiff's Exhibit 64 in evidence.

(The document referred to was marked as Plaintiff's Exhibit 64, and received in evidence.)

[Note: Plaintiff's Exhibit No. 64 will be found in the Book of Exhibits at page 834.]

The Court: You say you have something else?

Mr. Robinson: I have something a little bit out of the ordinary. I feel that I am forced to offer in evidence Defendant's pre-trial brief for Judge O'Connor in this matter. It appears, because of the issues that have been raised by the Government, that the language contained therein, particularly the language on page 3, where the following appears—

The Court: Whose brief was this?

Mr. Robinson: The defendant's pre-trial brief.

Mr. Mitchell: Prepared by Government counsel.

Mr. Robinson: "Before the Commissioner, plaintiff contended that for tax purposes an undivided half of the properties placed in the trusts was originally owned by her, but never presented to the Commissioner sufficient evidence to establish such fact."

Also, the language on page 3, lines 6 to 14, inclusive, relating to joint tenancy property that went into trust 6204,

and likewise the language on page 5, and on page 6, relative to the payment of insurance premiums by Mrs. Ferry out of [699] her interest in community property funds, and out of her separate funds. At this time I offer a true copy of the original of this brief into evidence.

Mr. Mitchell: Why not offer the original? Is the original in the file, your Honor?

The Court: Yes, the original is in the file.

Mr. Robinson: I will offer the original in evidence in this matter.

Mr. Mitchell: No objection, your Honor.

The Clerk: That will be Plaintiff's Exhibit 65, into evidence.

(The document referred to was marked Plaintiff's Exhibit No. 65, and received in evidence.)

[Note: Plaintiff's Exhibit No. 65 will be found in the Book of Exhibits at page 835.]

Mr. Robinson: That is the defendant's pre-trial brief, filed on April 1, 1943.

Mr. Mitchell: While the matter is fresh in my mind, with reference to the portion which counsel called your Honor's attention to already, from page 3, line 6:

"In respect of one of these five trusts, No. 6204, the evidence may show that before its creation"—

The Court: Is that the pre-trial brief?

Mr. Mitchell: My pre-trial brief, yes, your Honor.

The Court: I have it, page 3, line 6.

Mr. Mitchell: "In respect to one of these five trusts, No. 6204, the evidence may show that before its creation an undivided half of certain parcels of decedent's real [700] property was given to his wife by the device of transferring the parcels into joint tenancy property,

whereby he intentionally retained the possibility of reverter contingent upon his survivorship."

Your Honor will note the language. The reason that was presented there was because I knew that counsel was then asking me for a stipulation that the spouses acquired certain property by joint tenancy deeds, and I had gone over those deeds with counsel for the plaintiff, and knew that he would offer them, and my statement that "the evidence may show" is correct. The evidence does now show, as admitted by the Court. I intended to object to that at the time of the trial.

The Court: Are there any other exhibits?

Mr. Robinson: No other exhibits.

The Court: Do you rest?

Mr. Robinson: The plaintiff rests.

(Recess.)

Mr. Mitchell: If the Court please, counsel for both parties, during recess, have segregated the contents of Exhibit F for identification into three piles: The first is a portion that contains records from counsel for the plaintiff. I have indicated the grounds that were urged by the taxpayer in support of the refund claim, and it also contains some declarations against interest in the form of original letters from counsel for the plaintiff, and also contains [701] some records that counsel for the plaintiff thinks are declarations against interest by the Government, which I would like to have introduced.

The second pile contains many documents which I would like to read in evidence, which are not included in the first pile, because copies of them are already in evidence, and I did want the record to show that this administrative pile contains these documents:

Claim for refund;

Will of the decedent;

Death certificate;

Declaration of Trust No. 6204;

A statement of the contents of Trust No. 6204—I will withdraw that.

A letter, or rather a conference memorandum, for H. K. Melcher headed: Estate tax, March 12, 1938. That is already in evidence.

Another copy of death certificate, which is already in evidence;

A memorandum dated April 1, 1938, already in evidence;

In fact, all the items referred to now are already in evidence.

Letter to Catherine Ferry, dated January 22, 1938;

Letter to Catherine Ferry, dated February 20, 1940;

Declaration of trust, Trust No. 1080;

Declaration of Trust No. 1052; [702]

The original estate tax return;

Declaration of Trust No. 4358;

Declaration of Trust No. 2012;

Declaration of Trust No. 5869;

Revenue Agent Eddy's report, January 25, 1937.

Will counsel stipulate that the balance of the administrative file, marked Defendant's Exhibit F for identification, has no bearing upon the grounds urged by the taxpayer in support of the refund claim, or in support of any other claim, and that they refer in no way to the facts or evidence presented to the Commissioner in support of the refund claim?

Mr. Robinson: I will accept the stipulation.

Mr. Mitchell: We now offer then the contents of an envelope, and ask that it be substituted, and that the original envelope, Exhibit F for identification, be withdrawn, and that this now much smaller envelope be

marked Exhibit F for identification; and we now offer it in evidence as Defendant's Exhibit F, for the reasons heretofore stated.

Mr. Robinson: I will object to the introduction of each and all of the documents contained therein, with the exception of the protest dated 1940, and the protest dated 1937. Said objection is made upon each and all of the grounds heretofore made and referred to in connection with the offer of the original Exhibit F for identification. Likewise, upon the further ground that there has not been a [703] proper foundation laid for the establishment of the authenticity of these documents; and there has not been a proper showing that these documents are of an original nature; that they are inclusive of all the files of the Commissioner. The presumption may be that there are additional files contained therein. I also object upon the ground that they are hearsay, self-serving declarations, entirely incompetent, irrelevant and immaterial, and will neither tend to prove or disprove any of the issues in this case.

Mr. Mitchell: Does your Honor care to look at the documents?

The Court: They are offered for the limited purpose?

Mr. Mitchell: Yes, your Honor.

The Court: They will be admitted for the limited purpose stated.

The Clerk: Exhibit F.

(The documents referred to, heretofore marked as Defendant's Exhibit F, for identification, were received in evidence.)

[Note: Defendant's Exhibit F will be found in the Book of Exhibits at page 909.]

Mr. Mitchell: The defendant rests, your Honor.

Mr. Robinson: In conclusion plaintiff offers in evidence the protest dated 1940, and the protest dated 1937, incorporated in Exhibit F.

The Court: They will be received in evidence. Does the Government rest?

Mr. Mitchell: Yes, except I desire to make a motion.
[704]

For the purpose of the record, your Honor, the defendant moves to strike all evidence offered by the plaintiff and by the Government relating to the following issues: The issue of the partnership between the spouses; the issue relating to property held in joint tenancy by the spouses; the property that was placed in Trust No. 6204; relating to the issue concerning the excludability of the income in the trusts at the time of death, because such income did not belong to the decedent, but belonged to the beneficiaries. That is my first motion.

The Court: Motion denied.

Mr. Mitchell: I am going to make a motion to strike all evidence relating to the issue concerning whether or not any of the insurance premiums were paid with the separate property of Mrs. Ferry, this evidence consisting of the trust distributions, of the placing of the same in any banks, and the payment therewith of insurance premiums; and that also applies to all evidence introduced by both the plaintiff and the defendant.

The Court: Motion denied. [705]

* * * * *

[Endorsed]: Filed Dec. 10, 1943. [705]

[Endorsed]: No. 10946. United States Circuit Court of Appeals for the Ninth Circuit. Ethel Strickland Rogan, as Executrix of the Estate of Nat Rogan, Collector of Internal Revenue for the Sixth District of California, Deceased, Appellant, vs. Catherine B. Ferry, as Executrix of the Last Will and Testament of Peter Ferry, Deceased. Appellee. Transcript of Record. Upon Appeal From the District Court of the United States for the Southern District of California, Central Division.

Filed December 15, 1944.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

In the United States Circuit Court of Appeals
for the Ninth Circuit

No. 10946

ETHEL STRICKLAND ROGAN, Administratrix of the
Estate of NAT ROGAN, Decd. (formerly Collector of
Internal Revenue for the 6th District of California),
Appellant,

v.

CATHERINE B. FERRY, as Executrix of the Last
Will and Testament of PETER FERRY, Decd.,
Appellee.

STIPULATION

It is hereby stipulated that appellant, may and shall
have [95] to and including December 15, 1944, subject
to the approval of the Court, within which to file the rec-
ord and to docket this cause on appeal.

CHARLES H. CARR,
United States Attorney
E. H. MITCHELL and
GEORGE M. BRYANT,
Asst. U. S. Attorneys,
EUGENE HARPOLE,
Special Assistant to Chief Counsel,
Bureau of Internal Revenue,
By George M. Bryant
Attorneys for Appellant.

CLAUDE I. PARKER and
RALPH W. SMITH

Of Counsel: JOHN MOORE ROBINSON
By John Moore Robinson
Attorneys for Appellee

It Is So Ordered:

CURTIS D. WILBUR

Judge

A true copy. Attest, Oct. 12, 1944.

[Endorsed]: Filed Oct. 12, 1944. Paul P. O'Brien.
Clerk. [96]

[Title of Circuit Court of Appeals and Cause.]

AFFIDAVIT

E. H. Mitchell being first duly sworn deposes and says that he is one of the attorneys for the appellant;

That on the 18th day of September, 1944, an offer in compromise was received from Catherine B. Ferry, Executrix of the Last Will and Testament of Peter Ferry, Deceased;

That on the 9th day of October, 1944, the United States Attorney for the Southern District of California, attorney for the appellant, received from the Attorney General of the United States of America, a telegram advising that settlement negotiations were pending in this cause and requesting that the United States Attorney endeavor to secure an extension of time to file the record on appeal in this cause. [97]

That if settlement negotiations are successful the appeal herein will be dismissed; that a period of sixty days is a reasonable time to allow for such negotiations;

It Is Respectfully Requested that upon the above grounds time to file the record and docket this cause on appeal be extended to sixty days from October 16, 1944,

for the purpose of negotiations looking toward settlement, to wit, to December 15, 1944.

Dated this 11th day of October, 1944.

E. H. MITCHELL

Asst. U. S. Attorney

Subscribed and sworn to before me.

(Seal)

GEORGE M. BRYANT

Notary Public in and for the County of Los Angeles.
State of California.

My Commission expires April 2, 1945.

[Endorsed: Filed Oct. 12, 1944. [98]]

[Title of Circuit Court of Appeals and Cause.]

STATEMENT OF POINTS ON WHICH
APPELLANT INTENDS TO RELY

This is an appeal from those portions of the judgment attributable to the trial court's exclusion from the gross estate, for estate tax purposes, of the value of

1. Half of the corpus and all of the accumulated income of five inter vivos trusts numbered 5869, 2012, 4358, 1052 and 6204, which trusts were reported in Schedule E of the Estate Tax Return; and

2. Certain portions of the proceeds of insurance policies on the life of decedent and payable to named beneficiaries, which policies were reported in Schedule C-2 of the Estate Tax Return.

The value of 100 per centum of these items was included by the Commissioner in the gross estate.

In her claim for refund, insofar as it related to the alleged erroneous inclusion of above two items, the taxpayer made only the following claims:

(a) That "the creation" of said five trusts in 1925 and 1930 "effected * * * a property settlement agreement" between decedent and his wife whereby there then vested in each an undivided half interest in the corpus thereof, and that therefore each spouse contributed one-half the corpus to each such revocable trust; and

(b) That the surviving wife's post-1927 "community interest" in the life insurance proceeds should have been excluded upon the authority of *Lang v. Commissioner*, 304 U. S. 264.

In support of defendant-appellant's contention that 100% of such values was includible in the gross estate, she intends to urge and rely upon the following points, to wit:

1. There is no evidence to support either of the foregoing claims stated by the plaintiff in her refund claim, or to support any finding thereon in plaintiff's favor; and the findings are insufficient to support any conclusion in plaintiff's favor or against the defendant based upon either of said original grounds for recovery;

2(a). The refund claim is insufficient to support a suit based upon an enlarged and blanket claim [made for the first time during the trial (June, 1943) and a year and a half after the expiration of the time to file same] to the effect that all marital accumulations were originally co-owned by the spouses in undivided halves, as his and her separate property, by virtue of

an oral co-ownership agreement originally made by them in Ohio in 1906. Such new ground for recovery was likewise not raised in plaintiff's complaint.

2(b) The trial court was without jurisdiction to consider, decide, or base its judgment upon, this new, blanket claim;

2(c). All evidence offered by the plaintiff in support thereof should have been excluded by the trial court, and the defendant's objections thereto should have been sustained.

2(d). In the alternative, there is no substantial evidence to support the trial court's numerous findings and conclusions in respect of such blanket claim.

3(a). The refund claim is insufficient to support a suit based upon an alternative claim (made for the first time nearly a year after the commencement of this suit and over a year after the expiration of the time for filing a claim for refund) to the effect that twenty-seven of the thirty-eight parcels of real estate, constituting the corpus of Trust No. 6204, were, immediately prior to their transfer to such trust, held and co-owned by the spouses in equal undivided shares, some as tenants in common and some as joint tenants. Such partial and alternative ground for recovery was likewise not raised in the plaintiff's complaint.

3(b). The trial court was without jurisdiction to consider, decide, or base its judgment upon, this new and partial ground for recovery; and

3(c). All evidence offered by the plaintiff in support thereof should have been excluded by the trial court, and the defendant's objections thereto should have been sustained.

4(a). The refund claim is insufficient to support a suit based upon an alternative claim [made for the first time during the trial (June, 1943) and a year and a half after the expiration of the time to file same] to the effect that the Commissioner erroneously included in the gross estate "undistributed income" of the four trusts numbered 5869, 2012, 4358 and 1052. Such new and partial ground for recovery was likewise not raised in the plaintiff's complaint.

4(b). The trial court was without jurisdiction to consider, decide, or base its judgment upon, this new claim.

4(c). All evidence offered by the plaintiff in support thereof should have been excluded by the trial court, and the defendant's objections thereto should have been sustained.

5(a). The refund claim is insufficient to support a suit based upon an alternative claim (made for the first time in the amendment to plaintiff's complaint filed March 8, 1943, over a year and three months after the expiration of the time for filing a claim for refund) to the effect that one-half of some of the post-1925 premiums upon such policies of life insurance were paid with separate (not post-1927 community) funds of the decedent's surviving wife.

5(b). The trial court was without jurisdiction to consider, decide, or base its judgment upon, this new, enlarged and alternative ground for recovery.

5(c). All evidence offered by the plaintiff in support thereof should have been excluded by the trial court, and the defendant's objections thereto should have been sustained.

5(d). In the alternative, there is no evidence, substantial or otherwise; to support the trial court's findings or conclusions in respect of such new and alternative claim.

6. There is no evidence, substantial or otherwise, to support the trial court's findings or its conclusions to the effect that the Government or any of its officers, agents or employees, or the Commissioner of Internal Revenue, prior to November 11, 1941 (the last day for the taxpayer to file a claim for refund) had knowledge of, considered or acted upon, the four new claims referred to above, or to the effect that the Commissioner ever at any time made any determination whatever in response thereto or in respect thereof.

7. The trial court's express and implied findings and its implied conclusions to the effect that the Government waived the insufficiency of the refund claim to support a suit, decision or judgment founded upon any or all of such four new grounds for recovery, are supported by neither the evidence nor the law.

8. The trial court's express findings which, if true, entitle the plaintiff to a refund of about \$100,000 are inconsistent with its conclusion awarding to the plaintiff a judgment for the refund of exactly \$63,825.17 only.

9. The trial court's express findings, last referred to, are not supported by its memorandum order

of December 10, 1943, awarding to plaintiff a judgment for the recovery of exactly \$63,825.17 only.

10. The trial court erred in permitting (a) the March 8, 1943, amendment to plaintiff's complaint, and (b) the amendment by interlineation of the Second Amendment to plaintiff's complaint.

11. The trial court erred in overruling the defendant's "Objections to Form of Proposed Findings and Conclusions."

Dated: November 30, 1944.

SAMUEL O. CLARK, JR.

Asst. Attorney General

CHARLES H. CARR

United States Attorney

E. H. MITCHELL

Asst. United States Attorney

By E. H. Mitchell

Attorneys for Appellant

[Affidavit of Service by Mail.]

[Endorsed]: Filed Dec. 15, 1944. Paul P. O'Brien,
Clerk.

